81-2348

No. .....

Office - Supreme Court, U.S.
FILED
JUN 23 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AETNA LIFE AND CASUALTY COMPANY,

Petitioner,

—against—

MORRIS C. GURNEE,

Respondent.

STATE-WIDE INSURANCE COMPANY, *et al.*,

Petitioners,

—against—

MOSHE WEINREICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

CHARLES PLATTO
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioners Listed on the Inside Cover

Of Counsel:

WILLIAM E. HEGARTY
SUSAN BUCKLEY
KEVIN J. BURKE
CAHILL GORDON & REINDEL

RALPH L. HALPERN
RAICHLE, BANNING, WEISS & HALPERN

June 23, 1982

Petitioners:

Aetna Casualty & Surety Company; Aetna Insurance Company; Aetna Life Insurance Company; Allstate Insurance Company; American Automobile Insurance Company; American Mutual Liability Insurance Company; Amica Mutual Insurance Company; Atlantic Mutual Liability Insurance Company; Banner Casualty Company; Boston Old Colony Insurance Company; Centennial Insurance Company; Century Indemnity Company; Colonial Penn Insurance Company; Commercial Insurance Company of Newark, N.J.; Commercial Union Insurance Company; Continental Casualty Company; The Continental Insurance Company; Criterion Insurance Company; Eagle Insurance Company (sued as Lion Insurance Company); Employers Mutual Casualty Company; Federal Insurance Company; Fidelity and Casualty Company of New York; Fireman's Fund Insurance Company; Firemen's Insurance Company of Newark, N.J.; General Accident Insurance Company of America (sued as General Accident Fire & Life Assurance Corporation, Ltd.); Glens Falls Insurance Company; Globe Indemnity Company; Government Employees Insurance Company; Graphic Arts Mutual Insurance Company; Great American Insurance Company; Hanover Insurance Company; Hartford Accident & Indemnity Company; Hartford Casualty Insurance Company; Home Indemnity Company; Home Insurance Company; Ideal Mutual Insurance Company; Insurance Company of North America; Liberty Mutual Insurance Company; The Lumbermen's Mutual Insurance Company; Maryland Casualty Company; Merchants Mutual Insurance Company; Michigan Mutual Insurance Company (sued as Michigan Mutual Liability Company); National Grange Mutual Insurance Company; Nationwide Mutual Insurance Company; New Jersey Manufacturers Insurance Company; Newark Insurance Company; The North River Insurance Company; Prudential Property & Casualty Insurance Company; Reliance Insurance Company; Royal Insurance Company (sued as Royal-Globe Insurance Company); Royal Indemnity Company; Safeco Insurance Company of America; St. Paul Fire & Marine Insurance Company; Sentry Insurance Mutual Company; State Farm Mutual Automobile Insurance Company; State-Wide Insurance Company; Transamerica Insurance Company; Travelers Indemnity Company; Travelers Indemnity Company of Illinois; Travelers Insurance Company; Unigard Insurance Group; United States Fidelity & Guaranty Company; USAA Casualty Insurance Company; Utica Mutual Insurance Company; Wausau Underwriters Insurance Company (sued as Volkswagen Insurance Company); Western Employers Insurance Company (sued as Leatherby Insurance Company); Zurich Insurance Company.

Question Presented

Whether a state which for six years directed insurance carriers to provide maximum coverage of up to $800 per month to no-fault claimants and prohibited the carriers from charging premiums which would have provided greater coverage may, consistent with the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution, require the carriers to pay retroactively and without recoupment up to $200 per month in additional benefits for all claims made during the entire six year period?

Parties Below

The parties to these two actions which were consolidated for argument and decision below were:

Gurnee v. *Aetna Life and Casualty Company*

Appellant:

Morris C. Gurnee, For Himself and All Persons Entitled to First Party Benefits Similarly Situated

Respondent:

Aetna Life and Casualty Company, Itself and All Other Insurance Companies Under New York State Law Owing First Party Benefits Similarly Situated

Weinreich v. *State-Wide Insurance Company*

Appellant:

Moshe Weinreich, Suing Individually on His Own Behalf and Representatively On Behalf of a Class of Plaintiffs Similarly Situated

Respondents:

State-Wide Insurance Company, Allstate Insurance Company, Hartford Accident & Indemnity Company, Liberty Mutual Insurance Company, Government Employees Insurance Company, individually and representatively on behalf of a class of defendants similarly situated, and The Aetna Casualty & Surety Company, Aetna Insurance Company, Aetna Life Insurance Company, American Automobile Insurance Company, Amica Mutual Insurance Company, American Mutual Liability Insurance Company, Atlantic Mutual Liability Insurance Company, Banner Casualty Company,

Buffalo Insurance Company, Boston Old Colony Insurance Company, Centennial Insurance Company, Century Indemnity Company, Colonial Penn Insurance Company, Commercial Insurance Company of Newark, N.J., Commercial Union Insurance Company, Continental Casualty Company, Cosmopolitan Mutual Insurance Company, The Continental Insurance Company, Country-Wide Insurance Company, Criterion Insurance Company, Employers Mutual Casualty Company, Federal Insurance Company, Fidelity & Casualty Company of New York, Fireman's Fund Insurance Company, Firemen's Insurance Company of Newark, New Jersey, General Accident Fire & Life Assurance Corporation, Ltd., Globe Indemnity Company, Glens Falls Insurance Company, Graphic Arts Mutual Insurance Company, Great American Insurance Company, The Greater New York Mutual Insurance Company, Guardian Royal Exchange Assurance Company, Hanover Insurance Company, Hartford Casualty Insurance Company, The Home Insurance Company, The Home Indemnity Company, Ideal Mutual Insurance Company, Insurance Company of Greater New York, Insurance Company of North America, Leatherby Insurance Company, Liberty Mutual Insurance Company, Lion Insurance Company, The Lumbermen's Mutual Insurance Company, Lumbermen's Mutual Casualty Company, Maryland Casualty Company, Merchants Mutual Insurance Company, Michigan Mutual Liability Company, Nassau Insurance Company, National Grange Mutual Insurance Company, Nationwide Mutual Insurance Company, New Jersey Manufacturers Insurance Company, Newark Insurance Company, The North River Insurance Company, Prudential Property & Casualty Company, Reliance Insurance Company, Royal-Globe Insurance

Company, Royal Indemnity Company, Safeco Insurance Company of America, St. Paul Fire & Marine Insurance Company, Sentry Insurance Mutual Company, State Farm Mutual Automobile Insurance Company, Transamerica Insurance Company, Travelers Indemnity Company, Travelers Indemnity Company of Illinois, Travelers Insurance Company, Underwriters Insurance Company, Unigard Insurance Company, United States Fidelity & Guaranty Company, Utica Mutual Insurance Company, Worcester Mutual Insurance Company, Zurich Insurance Company, USAA Casualty Insurance Company and Volkswagen Insurance Company.*

---

* Due to the large number of parties and their affiliates and the resulting bulk of the required submission, petitioners are filing herewith a Supplemental Appendix setting forth the listings required by Rule 28.1 of the Rules of the Supreme Court.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Parties Below	ii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	2
Constitutional, Statutory and Regulatory Provisions	3
Statement of the Case	3
The Statutory Scheme	3
The *Kurcsics* Decision and the Instant Actions	6
The Decision of the Court of Appeals	9
Reasons for Granting the Writ	9
Conclusion	18
Appendix	1a
Appendix of Constitutional, Statutory and Regulatory Provisions	1a

TABLE OF AUTHORITIES

PAGE

Cases:

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 15, 16
Atlantic Coast Line R.R. v. *Florida*, 295 U.S. 301 (1935) 11

Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 12, 14
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1930) 12, 15

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 8
City of El Paso v. *Simmons*, 379 U.S. 497 (1965) 13
City of Los Angeles, Dep't of Water & Power v. *Manhart*, 435 U.S. 702 (1978) 11, 15, 16
Cox v. *Louisiana*, 379 U.S. 559 (1965) 14

Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) 17

Gelpcke v. *City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863) 17
Government Employees Insurance Co. v. *Sparrow*, 66 A.D.2d 782, 410 N.Y.S.2d 657 (2d Dep't 1978) 5
Great Northern Ry. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) 12

Kurcsics v. *Merchants Mutual Insurance Co.*, 49 N.Y.2d 451, 403 N.E.2d 159, 426 N.Y.S.2d 454 (1980), *rev'g* 65 A.D.2d 192, 411 N.Y.S.2d 90 (4th Dep't 1978) 2, 5-9

Lemon v. *Kurtzman*, 411 U.S. 192 (1973) 12

Marks v. *United States*, 430 U.S. 188 (1977) 14
Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 14

Rabe v. *Washington*, 405 U.S. 313 (1972) 14

PAGE

Raley v. *Ohio*, 360 U.S. 423 (1959) 14

Swift v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842) 17

Tidal Oil Co. v. *Flanagan*, 263 U.S. 444 (1924) 17

United States v. *United States Coin and Currency*, 401 U.S. 715 (1971) 17

Constitutional Provisions:

United States Constitution
Art. I, § 10 ..... 8, 10, 15, 16, 17
Amend. V 8
Amend. XIV ..... *passim*

Statutes:

Judicial Code
28 U.S.C. § 1257(3) (1976) 3
28 U.S.C. § 1652 (1976) 16

N.Y. Insurance Law
§ 5 (McKinney Supp. 1981-82) 4-5
§ 10 (McKinney 1966) 3
§ 21 (McKinney 1966) 4
§ 40(6) (McKinney 1966) 5
§ 183 (McKinney 1966) 5
§§ 670-678 (McKinney Supp. 1981-82) 3
§ 671 (McKinney Supp. 1981-82) 4, 5
§ 672 (McKinney Supp. 1981-82) 3
§ 675 (McKinney Supp. 1981-82) 7n
§ 677 (McKinney Supp. 1981-82) 5

N.Y. Vehicle & Traffic Law
§ 312 (McKinney Supp. 1981-82) 3
§ 321 (McKinney Supp. 1981-82) 3
§ 370 (McKinney 1970 & Supp. 1981-82) 3

Regulations:

PAGE

N.Y. Insurance Regulations

11 NYCRR § 65.2 5
11 NYCRR § 65.6 4
11 NYCRR § 65.8 5
11 NYCRR § 65.12 5
11 NYCRR § 65.15 ..... 4, 5

In the

Supreme Court of the United States

October Term, 1981

Aetna Life and Casualty Company,

Petitioner,

—against—

Morris C. Gurnee,

Respondent.

State-Wide Insurance Company, *et al.*,

Petitioners,

—against—

Moshe Weinreich,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

The memorandum decision of the New York Supreme Court, County of Erie, dismissing the complaint in *Gurnee* v. *Aetna Life and Casualty Co. ("Gurnee")* is reported at 104 Misc.2d 840, 428 N.Y.S.2d 992 and is set forth in the appendix at 1a-7a. The Court's order of dismissal is unreported and is set forth in the appendix at 8a-10a. The order of the Appellate Division, Fourth Judicial Department, unanimously affirming the order of the Supreme Court, County of Erie, is reported at 79 A.D.2d 960, 437 N.Y.S.2d 944 and is set forth in the appendix at 11a-12a.

The memorandum decision and the order of the New York Supreme Court, County of New York, dismissing the complaint in *Weinreich* v. *State-Wide Insurance Co. ("Weinreich")* are unreported and are set forth in the appendix at 13a-20a and 21a-23a, respectively. The order of the Appellate Division, First Judicial Department, unanimously affirming the order of the Supreme Court, County of New York, is reported at 80 A.D.2d 756, 437 N.Y.S.2d 994 and is set forth in the appendix at 24a-27a.

The opinion of the New York Court of Appeals reversing the determinations of the Appellate Division, Fourth and First Judicial Departments, in *Gurnee* and *Weinreich* respectively, is reported at 55 N.Y.2d 184, 433 N.E.2d 128, 448 N.Y.S.2d 145 and is set forth in the appendix at 28a-34a. The order of the Court of Appeals denying reargument is reported at 56 N.Y.2d 567 and is set forth in the appendix at 35a.

Also included in the appendix at 36a-49a are the majority and dissenting opinions of the Court of Appeals in *Kurcsics* v. *Merchants Mutual Insurance Co.*, 49 N.Y.2d 451, 403 N.E.2d 159, 426 N.Y.S.2d 454 (1980), a decision adopting a new interpretation of section 671 of the New York Insurance Law contrary to the prior regulations of the Superintendent of Insurance which implemented the statute. In the instant actions, the Court of Appeals ruled that its decision in *Kurcsics* was to be applied retroactively to the period covered by the regulations.

Jurisdiction

The judgment of the Court of Appeals was entered on February 18, 1982. (A. 28a-34a)* Petitioners' timely motion for reargument was denied on March 25, 1982. (A. 35a)

---

* References to "A....." are to appropriate pages of the appendix to this petition.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3) (1976).

Constitutional, Statutory and Regulatory Provisions

Relevant portions of constitutional, statutory and regulatory provisions involved herein appear in the appendix at the end of this petition at 1s-20s.

Statement of the Case

The Statutory Scheme

On February 1, 1974 the New York Comprehensive Automobile Insurance Reparations Act, Insurance Law, Article 18, §§ 670-78 (McKinney Supp. 1981-82), commonly referred to as the "No-Fault Law," went into effect. Similar No-Fault Laws are now in effect in more than half the States. The No-Fault Law, as suggested by its name, guarantees a threshold level of reimbursement to persons injured in automobile accidents without regard to fault. Every carrier writing auto insurance in the State of New York is required to provide for No-Fault coverage in its policies. Every motor vehicle owner in the State of New York is required to carry No-Fault coverage, and to pay premiums for the coverage afforded. N.Y. Insurance Law § 672(1); N.Y. Vehicle and Traffic Law §§ 312, 321 & 370 (McKinney 1970 & Supp. 1981-82).

Under the New York Insurance Law, the Insurance Department, a part of the Executive branch headed by the Superintendent, is charged with the responsibility of supervising the business of insurance in New York and the operations and practices of insurance carriers doing business in the State. N.Y. Insurance Law § 10 (McKinney 1966). The Superintendent of Insurance is also responsible for mandating terms and provisions of insurance policies and approving rates and premiums. The Superintendent is re-

quired by statute to promulgate regulations implementing the Insurance Law, including the No-Fault Law. *See* N.Y. Insurance Law § 21 (McKinney 1966) and §§ 672-678 (McKinney Supp. 1981-82).

One of the key provisions of the No-Fault Law is section 671(2), which provides for the payment by insurers of "first party benefits" to reimburse claimants for their defined "basic economic loss" *less* certain offsets including a 20% reduction of lost earnings benefits (to reflect the tax-free nature of the recovery). "Basic economic loss," against which offsets are to be deducted, is defined in section 671(1) to include lost earnings of up to $1,000 per month for up to three years.

In accordance with his statutory mandate, on the same day the No-Fault Law went into effect, the Superintendent of Insurance promulgated a series of regulations designed to implement the Law. One of the regulations that became effective on February 1, 1974 was section 65.6(n)(2)(xi), 11 NYCRR § 65.6(n)(2)(xi) (A. 20s), which specifically implemented section 671 of the No-Fault Law. Under this regulation, carriers were required to limit lost earnings payments to a maximum of $800 per month as a result of applying the required 20% offset to the $1,000 "basic economic loss" maximum, rather than to lost earnings in excess of $1,000. This regulation or re-enactments thereof (11 NYCRR § 65.15(n)(2)(xi) (A. 20s)) remained in effect for more than six years.

During the period 1974-1980:

—Insurance carriers were bound to follow the regulations of the Superintendent of Insurance which limited payment to $800 per month. They would have been subject to civil and criminal sanctions if they did not. *See Weinreich* v. *State-Wide Insurance Co.* (Sup.Ct. N.Y. Co.) (A. 16a); *see also* N.Y. Insurance Law § 5

(McKinney Supp. 1981-82) and § 40(6) (McKinney 1966).

—Rates and premiums were required to be set in accordance with the regulations. The premiums paid were for coverage of up to $800 per month. Carriers were not entitled to collect premiums to provide higher coverage. N.Y. Insurance Law § 183 (McKinney 1966) and § 677 (McKinney Supp. 1981-82).

—The terms of each No-Fault insurance contract in the State were mandated by the Superintendent of Insurance. The carriers were not permitted to alter those terms if they so desired. 11 NYCRR §§ 65.2, 65.12.

—Informational brochures bearing the picture and signature of the Governor of New York State were prepared by the Insurance Department and set forth in simple terms the $800 limit. The carriers were required to distribute these brochures to policyholders along with their insurance contracts. 11 NYCRR §§ 65.8(a)(1)(i), 65.12(e). A copy of the brochure appears in the appendix at 50a.

—In the event of a claim, carriers were obligated to distribute mandatory claim form cover letters in the form prescribed by the Insurance Department which also specified the $800 limitation. 11 NYCRR § 65.15(c)(3)(i). A copy of the letter appears in the appendix at 51a-53a.

—Two of the four Appellate Divisions of New York's Supreme Court were asked to rule on the extent of the coverage provided for by section 671 of the Insurance Law and both unanimously held that the maximum coverage was limited to $800 per month. *Government Employees Insurance Co.* v. *Sparrow*, 66 A.D.2d 782, 410 N.Y.S.2d 657 (2d Dep't 1978); *Kurcsics* v.

Merchants Mutual Insurance Co., 65 A.D.2d 192, 411 N.Y.S.2d 90 (4th Dep't 1978).

It is undisputed that from the time the No-Fault Law went into effect, carriers necessarily complied with the regulations limiting payments to $800 per month. *Gurnee* v. *Aetna Life and Casualty Co.*, 104 Misc.2d 840, 844, 428 N.Y.S.2d 992, 995 (Sup.Ct. Erie Co. 1980) (A. 5a); *Weinreich* v. *State-Wide Insurance Co.* (Sup.Ct. N.Y. Co. 1981) (A. 14a, 16a). The Superintendent of Insurance confirmed that if the carriers had not limited payments in this fashion they would have been subjected to sanctions for failing to comply with mandatory regulations of the Insurance Department and "for wasting insurance company assets." *Weinreich* v. *State-Wide Insurance Co.* (Sup.Ct. N.Y. Co. 1981) (A. 16a). *See also* WR 217.*

The Kurcsics Decision and the Instant Actions

On February 20, 1980—more than six years after the effective dates of the No-Fault Law and the regulations implementing it—the New York Court of Appeals issued a declaratory judgment in *Kurcsics* v. *Merchants Mutual Insurance Co.*, 49 N.Y.2d 451, 403 N.E.2d 159, 426 N.Y.S.2d 454 (1980), holding that section 671 required lost earnings payments of up to $1,000 per month, rather than $800 per month. In its decision the Court of Appeals acknowledged that the Superintendent of Insurance had for six years required by regulation that lost earnings benefits under section 671 were to be limited to $800 per month. The Court did not find that the regulations were unconstitutional or that their promulgation was an act in excess of the Superintendent's delegated powers. The Court ruled, however,

---

* References to "WR" are to the record on appeal in the *Weinreich* action. References to "GR" are to the record on appeal in the *Gurnee* action.

that the regulations were of no consequence and directed that the individual plaintiff be paid an additional $200 per month for the period of his claim (up to 36 months) plus attorneys' fees and statutory interest at the rate of 2% per month.*

In deciding *Kurcsics*, the Court of Appeals did not address the question of whether its decision was to be given retroactive effect to the thousands of claimants over a six-year period who had previously been paid maximum benefits of $800 per month, but had never sought or received additional payments, and had not paid premiums for coverage in excess of that amount.

In the wake of the *Kurcsics* decision, numerous proposed class and individual actions were filed in courts throughout the State of New York seeking retroactive application of *Kurcsics*. The instant actions, *Gurnee* v. *Aetna Life and Casualty Co.* (Sup.Ct. Erie Co.) and *Weinreich* v. *State-Wide Insurance Co.* (Sup.Ct. N.Y. Co.), were brought as proposed, all-encompassing class actions on behalf of all prior wage loss benefit recipients against every insurance carrier which issued No-Fault policies in the State seeking additional payments of up to $200 per month for up to thirty-six months plus statutory interest and attorneys' fees.

The carriers immediately moved to dismiss the complaints in the instant actions on the grounds that general retroactive application of the *Kurcsics* decision would violate the New York and United States Constitutions and would be impermissible as a matter of law and equity. In support of their motions, the carriers urged that to require retroactive payments under circumstances where their challenged conduct had been carried out for six years in

* Section 675 of the N.Y. Insurance Law provides for a penalty of 2% per month interest plus attorneys' fees where insurance carriers fail to make No-Fault payments in a timely fashion.

accordance with state-mandated requirements would violate the Due Process Clause of the Fourteenth Amendment. Additionally, the carriers urged that to grant such relief under circumstances where they were barred from recouping an amount equivalent to the premiums which otherwise would have been assessed to provide for the additional coverage constituted a taking of property without just compensation in violation of the Fifth Amendment as made applicable to the States through the Fourteenth Amendment.* Finally the carriers urged that to apply the *Kurcsics* decision retroactively would violate Article I, Section 10 of the Constitution in that it would substantially impair the contractual obligations incorporated in all No-Fault policies issued, the scope and terms of which had been mandated by the State.

The Supreme Courts for Erie and New York Counties granted defendants' motions to dismiss in *Gurnee* and *Weinreich* respectively, applying the equitable principles enunciated by this Court in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), without reaching the federal consitutional issues. *Gurnee* v. *Aetna Life and Casualty Co.,* 104 Misc.2d 840, 428 N.Y.S.2d 992 (Sup.Ct. Erie Co. 1980) (A. 1a-7a); *Weinreich* v. *State-Wide Insurance Co.* (Sup.Ct. N.Y. Co. 1981) (A. 13a-20a). The decisions were unanimously affirmed by the Appellate Division for the Fourth and First Departments. *Gurnee* v. *Aetna Life and Casualty Co.,* 79 A.D.2d 860, 437 N.Y.S.2d 944 (4th Dep't 1981) (A. 11a-12a); *Weinreich* v. *State-Wide Insurance Co.,* 80 A.D.2d 756, 437 N.Y.S.2d 994 (1st Dep't 1981) (A. 24a-27a). The Court of

---

* Insurance carriers are prohibited from recouping premiums for additional benefit payments not provided for in their rating structure from past or future policyholders. *See Gurnee* v. *Aetna Life and Casualty Co.,* 104 Misc.2d 840, 844-45, 428 N.Y.S.2d 992, 995 (Sup.Ct. Erie Co. 1980) (A. 6a); *Weinreich* v. *State-Wide Insurance Co.* (Sup.Ct. N.Y. Co. 1981) (A. 17a); WR 105, 220, 271, 273-74; GR 251). *Cf.* N.Y. Insurance Law § 677(5) (McKinney Supp. 1981-82).

Appeals granted leave to appeal and the cases were argued and considered together. The Solicitor General of New York State appeared on behalf of the Superintendent of Insurance as *amicus curiae* and argued in support of the carriers that the decision in *Kurcsics* should not be retroactively applied.

The Decision of the Court of Appeals

On February 18, 1982 the Court of Appeals reversed the unanimous determinations of the Appellate Divisions and held that the decision in *Kurcsics* should be retroactively applied to prior claims. *Gurnee* v. *Aetna Life and Casualty Co.*, 55 N.Y.2d 184, 433 N.E.2d 128, 448 N.Y.S.2d 145 (1982) (A. 28a-34a). The Court found that the equities favored the claimants on the ground that they were deprived of the additional benefits they were entitled to by statute even though they had never sought or paid for such benefits. The Court dismissed without comment the fact that the carriers were legally obligated to follow the regulations until the *Kurcsics* decision, on the ground that the Court had ultimately ruled in *Kurcsics* that the regulations were incorrect. The Court dismissed the federal constitutional issues as "unpersuasive" concluding rather that "equitable considerations" required that its *Kurcsics* decision be applied retroactively. *Id.* at 194, 433 N.E.2d at 131, 448 N.Y.S.2d at 148 (A. 33a).

Reasons for Granting the Writ

For six years under the force of law the State of New York regulated insurance carriers in their collection of premiums and payment of benefits under the No-Fault Law. Now, the State has reversed itself and is requiring the carriers to pay out massive additional retroactive benefits without compensation. As a result of the decision of the

New York Court of Appeals in the instant actions, the insurance carriers of New York State now face the prospect of paying out tens of millions of dollars of retroactive benefits and penalties although they were previously prohibited from paying such benefits and from collecting the premiums which would have provided for the benefits and cannot now recoup the underlying premiums. Having complied for six years with the binding regulations of the Superintendent of Insurance, the carriers are now being penalized for doing so.

The decision of the New York Court of Appeals is violative of fundamental constitutional principles. The retroactive overruling of regulations which the carriers were required by law to follow and the penalizing of the carriers for their prior compliance with those regulations violates the Due Process Clause of the Fourteenth Amendment. The requirement of payment of benefits without the possibility of collecting premiums is an unconstitutional taking in violation of the Fifth Amendment as applied to the States through the Fourteenth Amendment. The New York Court of Appeals' determination that insurance carriers must provide benefits over and above those provided for in the rate structure of their insurance contracts is an impairment of contract in violation of Article I, Section 10 of the Constitution.

This decision will affect the administration of the Insurance Law in New York and other States. Indeed, it will undoubtedly affect administrative regulation in all areas of the law and in all States. If this decision is allowed to stand, regulated entities in New York State, and other States, will never again be able to rely on the administrative regulations they are bound to follow. They will be placed in the position of challenging regulations and seek-

ing court review *ab initio* or operating for years under the regulations at their own peril. This will create chaos and make government unworkable.

In *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301 (1935), this Court ruled, without reaching the constitutional issue, that a federal court could not, in effect, retroactively overrule the regulations of a federal agency so as to require additional payments by regulated entities that had complied with the regulations. Writing for the Court, Justice Cardozo recognized that:

> "The carrier was not at liberty to take the law into its own hands and refuse submission to the order [of the agency] without the sanction of a court. It would have exposed itself to suits and penalties, both criminal and civil, if it had followed such a path. . . . Obedience was owing while the order was in force." 295 U.S. at 311 (citations omitted).

The decision of the New York Court of Appeals ignores these principles.

The decision below also ignores this Court's caution against retroactive judicial rulings in the field of insurance:

> "The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." *City of Los Angeles, Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 721 (1978) (footnote omitted).

It has nevertheless been suggested by the respondents and by the Court of Appeals itself that the decision below does not raise any constitutional issues and thus is not subject to review by this Court. Upon parsing the objections, it becomes apparent that fundamental constitutional issues do exist.

Plaintiffs suggested below on the basis of this Court's decision in *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), that the retroactive application of a judicial decision does not raise a constitutional issue. In *Sunburst*, however, this Court also held that prospective relief may be constitutionally fashioned when a long-sanctioned rule of law is overturned. Furthermore, in more recent rulings the Court has made clear that the *Sunburst* decision does not dispose of independent constitutional questions that may be raised by the retroactive application of a judicial decision. *See, e.g., Bouie* v. *City of Columbia*, 378 U.S. 347 (1964); *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 n.2 (1973). Significant independent constitutional issues are indeed raised by the decision below.

The Due Process Issues Are Substantial

In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930) Justice Brandeis, writing for a unanimous Court, stated:

> "If the [retroactive] result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. *Ettor* v. *Tacoma*, 228 U.S. 148. The violation is nonetheless clear when the result is accomplished by the state judiciary in the course of construing an otherwise valid (*First*

> *National Bank of Greeley* v. *Weld County*, 264 U.S. 450) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." *Id.* at 679-80 (footnotes omitted).

There is no more fundamental a guarantee protected by the Due Process Clause than the right to fair notice of what the law requires. As fundamenal is the proposition "that men should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property." *City of El Paso* v. *Simmons*, 379 U.S. 497, 522 (1965) (Black, J., dissenting). Yet the decision below is irreconcilable with such principles.

The Court below found that there was no denial of due process or an unconstitutional taking on the theory that the carriers simply were being required now to pay out what the statute required. However, this begs the question.

The carriers were told for more than six years by the authoritative state agency that the statute did not require that additional benefits be paid and, of course, that they could not collect premiums for such additional benefits. But now, the state, acting through its judiciary, is telling the carriers that the statute requires and always required the payment of additional benefits, which the carriers must now pay, even though they are forbidden from recouping the corresponding premiums. Further, the carriers are now threatened with a 2% per month punitive interest charge and attorneys' fees for failing to make the payments they were prohibited from making.

The issue thus becomes whether a government based on laws can conduct itself in this fashion, changing obligations

in midstream without notice and without compensation, and in so doing penalizing the carriers for their prior lawful conduct.

In *Raley* v. *Ohio*, 360 U.S. 423 (1959) and *Cox* v. *Louisiana*, 379 U.S. 559 (1965) this Court ruled that the Due Process Clause requires that citizens not be punished for relying on otherwise lawful directives of state agencies or officers even when they are subsequently determined to be erroneous. To hold otherwise, as this Court stated, "would be to sanction the most indefensible sort of entrapment by the State. . . ." *Raley* v. *Ohio, supra*, 360 U.S. at 438, *quoted in Cox* v. *Louisiana, supra*, 379 U.S. at 571.

In *Bouie* v. *City of Columbia, supra*, this Court held that the retroactive imposition of criminal penalties as a result of an unforeseen judicial construction of a statute violates the Due Process Clause.

> "When [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." 378 U.S. at 354-55.

Accord: *Marks* v. *United States*, 430 U.S. 188 (1977); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Rabe* v. *Washington*, 405 U.S. 313 (1972) (*per curiam*).

Here, too, under the decision below, the carriers would be deprived of their property and be subjected to civil penalties without the warnings and other protections required by due process notwithstanding their reliance on the mandatory directives of a state agency. Whether the guarantees of notice afforded by the Fourteenth Amendment can be ignored in the civil context is an issue worthy of this

Court's consideration. *Cf., Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra.*

Further, there can be little question that the requirement that the carriers now make payments when they were prohibited from collecting the underlying premiums amounts to a taking by the State, and we urge the Court to consider whether such action is permissible under the Fifth Amendment.

The Contract Clause Issue Is Substantial

Since February, 1974 not only were petitioners' payment obligations mandated by regulations of the Department of Insurance, so too were the terms of the No-Fault insurance policies petitioners issued. The basic term, the premium paid as consideration for the policy, was required to be set on the basis of an $800 per month maximum liability. Yet, as a result of the Court's decision below, the entire consideration structure has been altered: Policyholders are to receive a windfall for which no underlying compensation has been paid and petitioners' obligations are dramatically reformed.

In *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), this Court held that a Minnesota statute which sought retroactively to expand employers' contractual obligations to provide pension benefits not provided for in the pension plan was an unconstitutional impairment of contract in violation of Article I, Section 10 of the United States Constitution. In terms strikingly applicable to this case, and quoting at length from this Court's earlier decision in *City of Los Angeles, Dep't of Water & Power* v. *Manhart, supra*, the Court stated:

> "Not only did the state law thus retroactively modify the compensation that the company had agreed to pay its employees from 1963 to 1974, but also it did so

by changing the company's obligations in an area where the element of reliance was vital—the funding of a pension plan. As the Court has recently recognized:

> " 'These [pension] plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect.' *City of Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 721."

Allied Structural Steel Co. v. *Spannaus*, *supra*, 438 U.S. at 246-47 (footnote omitted).

The Court below dismissed the impairment of contract issue out of hand on the grounds that a judicial construction could not constitute a law impairing the obligation of contracts within the meaning of Article I, Section 10 of the Constitution. Such a narrow view is of doubtful validity today.

Article I, Section 10 provides "No State shall . . . pass any . . . law impairing the obligation of contracts. . . ." The contemporaneous Rules of Decision Act, part of the Judiciary Act of 1789 and now 28 U.S.C. § 1652 (1976), specifies that "[t]he laws of the several States" shall be regarded as

rules of decision in civil actions in the federal courts. In *Gelpcke* v. *City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863), and *Douglass* v. *County of Pike*, 101 U.S. 677 (1879), this Court held that a judicial construction of a statute may constitute an unconstitutional impairment. Later, in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), the Court held that only state legislation was comprehended by the "law" to which the contract clause refers. The Court distinguished *Gelpcke* and *Douglass* on the ground that those cases were diversity actions in which federal common law had been applied pursuant to *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), and that those decisions did not interpret the constitutional provision. It is clear, however, that *Tidal Oil* was decided under the pervasive influence of *Swift* v. *Tyson*, *supra*, and its progeny which had held, for many decades before *Tidal Oil*, that the State "laws" of the Rules of Decision Act also encompassed only legislation. That limited interpretation of "State law" has long since been abandoned in favor of the more realistic reading of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), which brings judge-made law within the scope of the "laws" of the Rules of Decision Act. The propriety of a similar view of "law" as it appears in Article I, Section 10 should now be confirmed by this Court. This Court has not yet had occasion to rule on the issue of judicial impairments of contracts in light of the redefinition of the concept of State "law" in *Erie*, although the *Gelpcke* case and its principles have been cited with approval by several members of the Court in recent years. *See United States* v. *United States Coin and Currency*, 401 U.S. 715, 730 (1971) (White, J. dissenting, joined by Burger, C. J., Stewart, J. and Blackmun, J.).

CONCLUSION

The action of the State of New York in first requiring insurance carriers to comply for six years with binding regulations governing their premiums, policies and payments and then reversing those regulations so as to invalidate past practices and impose new retroactive obligations on the carriers along with penalties and with no recoupment does indeed raise serious constitutional questions that merit review by the Court.

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

CHARLES PLATTO
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioners

Of Counsel:

WILLIAM E. HEGARTY
SUSAN BUCKLEY
KEVIN J. BURKE
CAHILL GORDON & REINDEL

RALPH L. HALPERN
RAICHLE, BANNING, WEISS & HALPERN

June 23, 1982

APPENDIX

CONTENTS

PAGE

Memorandum Decision of the Supreme Court, County of Erie, Granting Defendants' Motion to Dismiss the Complaint in *Gurnee* v. *Aetna Life and Casualty Company* ("*Gurnee*") 1a

Order of the Supreme Court, County of Erie, Dismissing the Complaint in *Gurnee* 8a

Order of the Appellate Division, Fourth Judicial Department, Affirming the Order of the Supreme Court, County of Erie, Dismissing the Complaint in *Gurnee* 11a

Memorandum Decision of the Supreme Court, County of New York, Granting Defendants' Motion to Dismiss the Complaint in *Weinreich* v. *State-Wide Insurance Company* ("*Weinreich*") 13a

Order of the Supreme Court, County of New York, Dismissing the Complaint in *Weinreich* 21a

Order of the Appellate Division, First Judicial Department, Affirming the Order of the Supreme Court, County of New York, Dismissing the Complaint in *Weinreich* 24a

Opinion and Order of the New York Court of Appeals, Reversing the Orders of the Fourth and First Judicial Departments of the Appellate Division in *Gurnee* and *Weinreich* 28a

Order of the New York Court of Appeals Denying Defendants' Motion for Reargument 35a

PAGE

Majority and Dissenting Opinions of the New York Court of Appeals in *Kurcsics* v. *Merchants Mutual Insurance Company* 36a

Informational Brochure of the New York Department of Insurance (1977) 50a

Mandatory Claim Form Cover Letter (1977) 51a

Memorandum Decision of the New York Supreme Court, County of Erie

MORRIS C. GURNER, on Behalf of Himself and All Other Persons Similarly Situated, Plaintiff v. AETNA LIFE AND CASUALTY COMPANY, on Behalf of Itself and All Other Insurance Companies Similarly Situated, Defendant.

Supreme Court, Erie County, June 17, 1980

OPINION OF THE COURT

JAMES B. KANE, J.

This action arises out of the February 20, 1980 decision of the Court of Appeals in *Kurcsics* v. *Merchant Mut. Ins. Co.* (49 NY2d 451) wherein it was held that a covered person who has sustained a loss of earnings in excess of $1,000 per month is entitled to recover as first-party benefits 80% of his actual lost earnings up to a maximum recovery of $1,000 per month and not the $800 per month as directed by the New York State Department of Insurance. Kurcsics was awarded the $200 monthly difference plus 2% interest per month on the overdue amount and reasonable attorneys' fees.

Plaintiff, in this action thereafter, on February 27, 1980 caused a summons and complaint to be served upon defendant seeking the same relief as awarded in *Kurcsics* on his own behalf and for all others similarly situated not only from Aetna but from all other insurance companies similarly situated. Subsequently, plaintiff by notice of motion advised defendant that plaintiff would be moving pursuant to CPLR 902 for certification of the plaintiff and defendant classes. Before the return date of the class action motion defendant, after failing to obtain plaintiff's counsel's consent, moved for an extension of time to answer or otherwise move in response to plaintiff's complaint. This court in a

written decision gave defendant an extension until May 15, 1980.

Defendant by notice of motion dated May 15, 1980 informed plaintiff that on May 29, 1980 defendant would move for an order pursuant to CPLR 2201 staying plaintiff's action pending the final determination of a motion to dismiss a similar action pending in the Supreme Court, New York County; or in the alternative for an order pursuant to CPLR 3211 dismissing plaintiff's complaint for failure to state a cause of action. Plaintiff thereon moved for reargument of the prior motion and to enjoin all other similar actions pending in New York State.

Plaintiff contends the court should either move to certify the plaintiff and defendant classes or somehow consolidate all of the other pending similar actions before considering defendant's motion to dismiss. Defendant contends that the court should first address defendant's motion to dismiss in that if the court determined *Kurcsics* was not to be given retroactive application, there would be no basis for plaintiff's individual or class action claim.

The court will initially address defendant's motion to dismiss in order to avoid the possibly unnecessary costs and disbursements associated with class notification, discovery and certification.

Defendant asserts various reasons *Kurcsics* may not or should not be given retroactive effect.

Defendant contends that a retroactive application of *Kurcsics* would be in violation of the New York and United States Constitutions in that it would be a taking of private property without just compensation due to the calculations used by defendant to establish the prior premium rate structure. Additionally, as to certain subgroups of plain-

tiff's proposed class defendant contends a retroactive application of *Kurcsics* would be an impairment of a private contract and, therefore, in violation of section 10 of article I of the United States Constitution.

However, the court finds it unnecessary to address the constitutional issues since in the court's opinion equity would prevent a retroactive application of *Kurcsics* in this situation even if such an application was found to be constitutional.

In *Chevron Oil Co.* v. *Huson* (404 US 97, 106-107), the Supreme Court stated: "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted] Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [Citation omitted.] Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.'"

Upon a consideration of these factors it is the court's opinion that *Kurcsics* should not be applied retroactively.

The Court of Appeals in *Kurcsics* (49 NY2d 451, 454, *supra*) began its opinion by stating: "This appeal raises a question of first impression in this court concerning the con-

struction of the phrase 'first party benefits' ". The Court of Appeals resolution of this "question of first impression" cannot be said to have been clearly foreshadowed. In fact the Court of Appeals decision overruled the unanimous determination of the Appellate Division, Fourth Department, in *Kurcsics* (65 AD2d 192), the unanimous determination of the Appellate Division, Second Department, in *Matter of Government Employees Ins. Co.* v. *Sparrow* 66 AD2d 782) and the clear language of the regulations promulgated by the New York State Department of Insurance, which defendant had been compelled to follow.

The purpose of the no-fault legislation basically was to eliminate the vast majority of auto accident negligence suits from the judicial arena and to assure prompt compensation to accident victims of substantially all of their economic loss without regard to fault (*Montgomery* v. *Daniels*, 38 NY2d 41, 46, 55). Insurance basically involves a sharing of risks. The foreseeable risks and the limits of potential exposure are included in the calculation of insurer's liability and the premiums charged reflect this calculation. Defendant in submitting its premium rate schedule to the Insurance Department, as required by section 677 of the Insurance Law, based its calculations on a potential maximum exposure of $800 per month and not $1,000 per month. A retroactive application of the Court of Appeals decision in *Kurcsics*, overruling the Insurance Department's "interpretive regulations" on maximum exposure, could possibly jeopardize some of the insurers' solvency and ultimately the benefits of other insured individuals. For this reason it has been held that rules applying to insurance or pension funds should not be given retroactive effect unless the Legislature has plainly commanded that result (*Los Angeles Dept. of Water & Power* v. *Manhart*, 435 US 702).

Memorandum Decision of the New York Supreme Court, County of Erie

Since the practical construction of the Insurance Law regarding maximum first-party benefits for loss of earnings had been well known, 11 NYCRR 65.6 (n) (2) (xi) establishing maximum payment of $800 per month has been followed since its effective date of February 1, 1974, the Legislature is charged with knowledge of this construction and its failure to interfere indicates its acquiescence (see *RKO-Keith-Orpheum Theaters* v. *City of New York*, 308 NY 493, 500; *Engle* v. *Talarico*, 33 NY2d 237, 242; *Matter of Hellerstein* v. *Assessor of Town of Islip*, 37 NY2d 1, 10). Retroactive application of *Kurcsics* could not be said to be commanded by the Legislature.

Besides possibly jeopardizing the solvency of some of the insurers and thereby ultimately the benefits of other insured individuals a retroactive application of *Kurcsics* is not necessary to insure that future claims up to a maximum of $1,000 per month are promptly paid.

Finally, a retroactive application of *Kurcsics* would produce substantial inequitable results.

There is no evidence of bad faith on the part of defendant. Defendant felt it was mandated to follow the regulations established by the Insurance Department in regards to the maximum recoverable first-party benefits and it did so. Defendant relied on these regulations in assessing its premium rate schedule pursuant to section 183 of the Insurance Law and in paying $800 maximum per month on the claims submitted to it. It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy (*Lemon* v. *Kurtzman*, 411 US 192, 203). The Court of Appeals in *New York Pub. Interest Research Group* v. *Steingut* (40 NY2d 250, 261) after determining that certain legislative allowances were un-

constitutionally authorized held that "equitable interests of fairness and justice" mandate that no reimbursement be demanded from the recipients who, in good faith and supported by long-continued practice, relied on the disbursements as authorized and proper.

These "equitable interests of fairness and justice" would seem to forbid a retroactive application of *Kurcsics*. In *New York Pub. Interest Research Group* v. *Steingut* (*supra*), the legislators actually received unauthorized funds while in the present situation defendant never charged, nor would have been able to justify charging increased premiums to cover the difference between a maximum monthly exposure of $1,000 as opposed to $800. Defendant has taken nothing from plaintiff that equity demands he should be compelled to return (see *Atlantic Coast Line* v. *Florida*, 295 US 301, 310).

Additionally, defendant in a supporting affidavit by an actuary with Allstate alleges that "[u]nder commonly accepted insurance ratemaking principles, ratemaking is prospective for losses which are anticipated to be incurred in connection with insurance policies to be issued on or after specified future date. Nonrecurring past losses, such as those which would directly flow from the retroactive application of the *Kurcsics* decision, would not be recovered in future ratemaking proceedings". If there exists no methods for defendant to recoup or somehow recover the losses incurred by a retroactive application of *Kurcsics* such an application would clearly bring about an equitable result.

Precedent exists for and equity demands a prospective application of a decision such as *Kurcsics* (*New York Pub. Interest Research Group* v. *Steingut*, *supra*; *Chevron Oil Co.* v. *Huson*, 404 US 97, *supra*; *Atlantic Coast Line* v.

Memorandum Decision of the New York Supreme Court, County of Erie

Florida, supra; Miranda v. *Arizona,* 384 US 436). The Court of Appeals in *Hellerstein* v. *Assessor of Town of Islip* (37 NY2d 1, *supra*), after determining that fractional assessment was in violation of the New York Constitution felt that equity demand that their determination be given prospective application not just from the date of the decision, June 5, 1975 but from December 31, 1976, approximately a year and one-half later.

For the reasons stated above it is this court's opinion that *Kurcsics* is not to be given retroactive application and for that reason defendant's motion for an order pursuant to CPLR 3211 dismissing plaintiff's complaint for failure to state a cause of action is granted.

Order of the New York Supreme Court, County of Erie

At a Special Term of this Court held in and for the County of Erie at the Erie County Hall in the City of Buffalo, New York on the 28th day of May 1980.

Present:

HON. JAMES B. KANE,
Justice Presiding.

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ERIE

Index No. E-77549

MORRIS C. GURNER,

Plaintiff,

vs.

AETNA LIFE AND CASUALTY COMPANY,

Defendant.

ORDER

A motion having been made by the defendant Aetna Life and Casualty Company for an order staying this action pending the final determination of a motion to dismiss the action pending in the Supreme Court, County of New York, entitled "Moshe Weinreich vs. State-Wide Insurance Company", Index No. 05272/80 (the "Weinreich action"); or, in the alternative, for an order dismissing the complaint in this action for failure to state a cause of action; and a motion having been made by the plaintiff for an order for

renewal and or reargument, vacatur and modification of the order granted herein on May 14, 1980 and for an order for injunctive relief staying the defendant from proceeding with motions to dismiss and for class certifications and other such motions and other same and similar actions until the motions in this action are heard and determined or until further order of this Court,

Now, on reading the complaint, the notice of motion dated May 15, 1980, the affidavit of Ralph L. Halpern sworn to May 12, 1980, the exhibits annexed thereto, the order to show cause dated May 20, 1980, the affidavit of Willard M. Pottle, Jr. sworn to May 20, 1980, the order herein dated May 23, 1980, the affirmation of Ralph L. Halpern dated May 23, 1980, the affidavit of Willard M. Pottle, Jr. sworn to May 23, 1980 and the affidavit of Charles Platto sworn to May 26, 1980, and upon all the pleadings and proceedings heretofore had and taken herein and after hearing Raichle, Banning, Weiss & Halpern (Ralph L. Halpern of counsel) and Cahill Gordon & Reindel (William E. Hegarty, Charles Platto, Donald S. Parker, Charles Gilman and Kenneth Vittor of counsel), both attorneys for the defendant, in support of defendant's motion and in opposition to plaintiff's motion, Dobozin & Pottle (Willard M. Pottle, Jr. of counsel), attorneys for the plaintiff, in opposition to defendant's motion and in support of plaintiff's motion, and due deliberation having been had and a memorandum decision dated June 17, 1980 having been filed, it is

Ordered, that the motion for an order dismissing the complaint for failure to state a cause of action be and the same hereby is granted; and it is further

Ordered, that the complaint be and the same hereby is dismissed; and it is further

Order of the New York Supreme Court, County of Erie

ORDERED, that, accordingly, all the other requested relief be and the same hereby is denied as moot and academic.

/s/ JAMES B. KANE
J.S.C.

GRANTED
JUN 18 1980
COURT CLERK A. DIMINO

Order of the Appellate Division, Fourth Judicial Department

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

Present:

CARDAMONE, *J.P.*,
SIMONS, HANCOCK, CALLAHAN, MOULE, *JJ.*

Morris C. Gurnee, for Himself and All Persons Entitled to First Party Benefits Similarly Situated,

Appellant,

v.

Aetna Life and Casualty Company, Itself and All Other Insurance Companies Under New York State Law Owing First Party Benefits Similarly Situated,

Respondent.

The above named Morris C. Gurnee, for himself and all persons entitled to first party benefits similarly situated having appealed to this Court from an order of the Supreme Court, entered in the Erie County Clerk's office on June 19, 1980 and said appeal having been argued by Willard Pottle of counsel for appellant, Charles Platto of counsel for respondent and submitted by Abraham Fuchsberg, amicus curiae for Samuel Uretsky, et al. and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be and the same hereby is unanimously affirmed with costs

Order of the Appellate Division,
Fourth Judicial Department

on the opinion at Special Term, Kane, J. (428 NYS2d 992). The motion to strike the appendix from respondent's brief is denied.

Entered: Dec 12 1980

Mary F. Zoller,
Clerk

SUPREME COURT
Appellate Division
Fourth Judicial Department
Clerk's Office, Rochester, N. Y.

I, Mary F. Zoller, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this Dec 12, 1980

/s/ Mary F. Zoller
Clerk.

Memorandum Decision of the New York Supreme Court, County of New York

SUPREME COURT, NEW YORK COUNTY

SPECIAL TERM, PART I

Index No. 5272/80

Cal. No. 16 of 6/25/80

MOSHE WEINREICH, suing individually on his own behalf and representatively on behalf of a class of plaintiffs similarly situated,

Plaintiff,

—against—

STATE-WIDE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, individually and representatively on behalf of a class of defendants similarly situated,

Defendants.

SCHWARTZ, J.:

Motions no. 16, 31, 32, 33, 76 and 77 of June 25, 1980 are consolidated for disposition.

The defendants State-Wide Insurance Company, Allstate Insurance Company, Hartford Accident & Indemnity Company, Liberty Mutual Insurance Company, Government Employees Insurance Company, individually and representatively on behalf of a class of defendants similarly situated, move for an order dismissing the complaint for failure to state a cause of action.

Memorandum Decision of the New York Supreme Court, County of New York

Plaintiff moves for an order determining that this action may be maintained as a class action.

The Attorney General of the State of New York requested and was granted leave to appear herein for the Superintendent of Insurance of the State of New York, as *amicus curiae* on the question of the retroactive application of *Kurcsics* v. *Merchants Mutual Insurance Company*, 49 N.Y. 2d 451 (1980).

Plaintiff's claim is for additional benefits for loss of earnings resulting from personal injuries allegedly sustained on July 1, 1975 in an accident involving a motor vehicle insured under a policy of insurance issued by defendant State-Wide Insurance Company ("State-Wide") pursuant to the provisions of the New York Comprehensive Automobile Insurance Reparations Act, Insurance Law, Article 18 §§670-78 (McKinney Supp. 1979-80), commonly referred to as the "No-Fault Law."

For 35 months plaintiff received payments from State-Wide reimbursing him for loss of earnings of up to $800 per month. The $800 monthly payments were made in accordance with governing Insurance Department regulations providing that the maximum permissible payment under the No-Fault Law for loss of earnings was $800 per month for up to 36 months.

Insurance Law §671(1) provides: "1. 'Basic economic loss' means, up to fifty thousand dollars per person. . . . (b) loss of earnings from work which the injured person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to one thousand dollars per month for not more than three years from the date of the accident causing the injury. . . ."

Memorandum Decision of the New York Supreme Court, County of New York

Insurance Law §671(2) provides: "2. 'First party benefits' means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less: (a) twenty percent of lost earnings pursuant to paragraph (b) of subdivision one of this section. . ."

Insurance Department Regulations 65.6(n)(2)(xi) and 65.15(n)(2)(xi) provided that the $1,000 per month lost earnings component, of basic economic loss defined in Section 671(1) of the Insurance Law, when reduced by a 20% offset as required by Section 671(2) of the Insurance Law, resulted in a maximum payment of $800 per month.

On February 20, 1980, the Court of Appeals, in *Kurcsics* v. *Merchants Mutual Insurance Co.*, 49 N.Y.2d 451, dealing with what it characterized on p. 454 as "a question of first impression", issued a declaratory judgment holding that under the Insurance Law an injured person can recover up to $1,000 per month from the insurer for lost earnings.

The instant complaint seeks general retroactive application of the holding in *Kurcsics*. Plaintiff claims that he and the class which he seeks to represent comprising all other persons who received $800 per month rather than $1,000 should recover the additional $200 per month for up to three years under Section 671 of the Insurance Law, with statutory interest at the rate of 2% per month and attorneys' fees under Section 675 of the Insurance Law. Plaintiff estimates that there may be more than 300,000 such persons in this class.

The Superintendent of Insurance of the State of New York ("Superintendent"), as *amicus curiae*, submits an affidavit opposing the retroactive application of the holding in *Kurcsics*. The Attorney General submits a memorandum of law arguing that the retroactive application of the

Kurcsics decision would be inequitable to both consumers and the insurance industry.

In February 1974, the New York Comprehensive Automobile Insurance Reparations Act, (commonly known as the No-Fault Law) Insurance Law, Article 18 §§670-78 (McKinney Supp. 1979), went into effect. At the time of the enactment of the No-Fault Law and amendments thereto, a series of regulations were promulgated by the Superintendents of Insurance. Among these regulations were 11 NYCRR 65.6(n)(2)(xi) and 65.15(n)(2)(xi) which provided for maximum wage loss payments of up to $800 per month.

Insurance carriers under the jurisdiction of the Insurance Department were obligated to abide by these regulations. Rates were to be set in accordance with these regulations, and premiums were to be collected in accordance with them. Policies of insurance issued pursuant to the No-Fault Law were in the form mandated by the Insurance Department regulations, and claim reserves were required to be established by insurers in accordance with these regulations. Insurers were required to provide their policyholders with informational brochures and cover letters setting forth, *inter alia*, the $800 per month ceiling.

These regulations were enforced by the Insurance Department. The Superintendent states that if the insurance carriers had not complied with these regulations (e.g., if the insurance carriers had paid claimants $1,000 per month in lost earnings benefits or had established their claim reserves at that level) they would have been subjected to administrative sanctions by the Insurance Department for failing to comply with mandatory regulations of the Insurance Department and for wasting insurance company assets.

Memorandum Decision of the New York Supreme Court, County of New York

The Superintendent emphasizes that he is not seeking to collatorally attack the *Kurcsics* decision. He states that he has ordered that insurers and self-insurers give full prospective implementation of *Kurcsics*. The Superintendent contends, nevertheless, that as a matter of sound law and policy, a retroactive application of *Kurcsics* would be harmful to the public and establish a harmful precedent.

The Superintendent points out that if *Kurcsics* is applied retroactively, licenses of the Insurance Department and other agencies could no longer rely on governmental regulations and would find it necessary to seek declaratory judgments on substantially all regulations, present and future, which have not yet been construed by this state's highest court. The Insurance Department and other State agencies could not function effectively under such conditions.

It is argued that retroactive application of *Kurcsics* would also restrict the availability of insurance in this state generally, since retroactive payments of many millions of dollars would reduce every insurer's capacity to write business. Any retroactively-directed payments could not be recovered in future ratemaking proceedings and would have to come out of an insurer's surplus.

Thousands of arbitrations, resolved by settlement or award, could be subject to challenge. Self insurers, such as utilities, public authorities, and taxi fleets would all be potentially subject to substantial retroactive claims for which they are not covered and have not received any premiums.

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) the United States Supreme Court stated at pp. 106-107:

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate fac-

> tors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., *Hanover Shoe* v. *United Shoe Machinery Corp.*, supra [392 U.S.], at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen* v. *State Board of Elections*, supra [393 U.S.], at 572. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter* v. *Walker*, supra [381 U.S.], at 629. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice of hardship" by a holding of nonretroactivity.' *Cipriano* v. *City of Houma*, supra [395 U.S.], at 706."

Applying the standards as set forth in *Chevron Oil Co.* v. *Huson* to the case at bar, equitable considerations dictate against a retroactive application of the *Kurcsics* decision. In the first place, the Court of Appeals recognized that the issue in *Kurcsics* was one "of first impression in this Court concerning the construction of the phrase 'first party benefits' . . ." (49 N.Y.2d at p. 54). Indeed, the Court of Appeals decision in that case overruled the unanimous Appellate Division, Fourth Department decision in that case, 65 A.D.2d 192, the unanimous decision of the Appellate Division, Second Department in *Government Employees Insurance Department* v. *Sparrow*, 66 A.D.2d 782, and

was contrary to the interpretation of the statute promulgated by the Insurance Department in its regulations which all insurers were required to follow. The interpretation of the statute by the Court of Appeals in *Kurcsics* can not be said to have been "clearly foreshadowed."

Applying the second factor of the *Chevron Oil Co.* v. *Huson* formula, the basic purpose of the "No Fault" legislation was designed to combat the spiraling cost of auto insurance by reducing the number of auto accident negligence suits and by passing along the resultant savings to the consumers in the form of lower automobile insurance premiums. (See *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 46). A key element in reducing the cost of auto insurance was the adoption of the 20% offset provision which was based on recognition that since work-loss benefits were not taxable, payment of the maximum work-loss benefits of $1,000 per month without a 20% offset would produce a windfall to the wage earner. The rates of the insurers that were approved by the Insurance Department were based upon the premises that loss earnings benefits were to be limited to a maximum of $800 per month. If the maximum benefits payable for wage loss had been $1,000 per month, the insurers would necessarily have had to charge the public higher premiums to reflect their increased liability.

As to the third factor, a retroactive application of *Kurcsics* would produce substantial inequitable results. The insurers whose rates had been based upon maximum liability for wage loss of $800 per month would be exposed to additional payments of up to $1,000 a month without the possibility of adjusting their rates to cover this loss. In addition, insurers would be liable to interest payments of 2% per month and attorneys fees to those parties who are now found to be retroactively entitled to $1,000 per month

despite the fact that the insurers had not been dilatory but had been following the Insurance Department's regulations.

It would be inequitable for insureds who paid premiums based on the maximum potential of receiving $800 per month for such earnings to now receive $1,000 a month and have the additional windfall of not being required to pay taxes on such payments.

It is clear that the inequity imposed by retroactive application of the *Kurcsics* holding provides ample basis for avoiding the "injustice of hardship" by a holding of non-retroactivity. (*Chevron Oil Co.* v. *Huson*, supra; *Cipriano* v. *City of Houma*, 395 U.S. at page 706).

In the recent case of *Gurnie* v. *Aetna Life and Casualty Company* (N.Y.L.J. 6/26/80, Sup. Ct. Erie County) the court held that the *Kurcsics* decision of the Court of Appeals should not be given retroactive effect, stating ". . . in the court's opinion equity would prevent a retroactive application of *Kurcsics* in this situation even if such an application was found to be constitutional."

Accordingly, this court finds that the decision in *Kurcsics* v. *Merchants Mutual Insurance Company*, (supra) should not be given retroactive effect.

The motions by defendants for an order dismissing the complaint is granted. Plaintiff's motion is denied.

Settle order.

Dated: August 5, 1980.

/s/ H. G. S.
J.S.C.

Order of the New York Supreme Court, County of New York

INDEX No. 05272/80

PRESENT:

HON. HILDA G. SCHWARTZ,

Justice.

At a Special Term of this Court in and for the County of New York, at the Courthouse, 60 Centre Street, New York, New York on the 9th day of September, 1980.

MOSHE WEINREICH,

Plaintiff,

—against—

STATE-WIDE INSURANCE COMPANY, et al.,

Defendants.

ORDER

Motions having been made by the defendants hereto, for an order pursuant to CPLR § 3211 dismissing this action for failure to state a cause of action; and a motion having been made by plaintiff Moshe Weinreich for an order pursuant to CPLR § 902 certifying this action as a class action,

And the Court having issued its memorandum decision dated August 5, 1980,

Now, upon reading and filing the complaint, defendants' notice of motion dated May 15, 1980, the affidavit of WIL-

Order of the New York Supreme Court, County of New York

LIAM E. HEGARTY, Esq., sworn to May 14, 1980 and exhibits annexed thereto, defendants' notice of motion dated May 16, 1980, the affidavit of CHARLES PLATTO, Esq., sworn to May 16, 1980, the supplemental affidavit of WILLIAM E. HEGARTY, Esq., sworn to June 19, 1980, the notice of motion dated May 15, 1980, the affidavit of EUGENE A. LEIMAN, Esq., sworn to May 15, 1980, the notice of motion dated May 16, 1980, the affidavit of HERBERT DICKER, Esq., sworn to May 19, 1980, the affidavit of IRVING ROSEN, Esq., sworn to May 21, 1980, the notice of motion dated May 27, 1980, the affirmation of ELLIOT A. CRISTANTELLO, Esq., affirmed May 27, 1980, the notice of motion dated May 29, 1980, the affirmation of JEROME H. BERKOWITZ, Esq., affirmed May 29, 1980, the notice of motion dated June 2, 1980, the affirmation of HAROLD M. FOSTER, affirmed June 3, 1980, the notice of cross-motion dated June 5, 1980, the affidavit of IRVING ROSEN, sworn to June 5, 1980, and the affidavit of ALBERT B. LEWIS, Superintendent of Insurance as *amicus curiae* sworn to June 24, 1980, and plaintiff's notice of motion dated May 14, 1980, the affidavit of LAWRENCE MILBERG, Esq., sworn to May 12, 1980, the reply affidavit of LAWRENCE MILBERG, Esq., sworn to June 12, 1980, the opposition affidavit of LAWRENCE MILBERG, Esq., sworn to June 24, 1980, and the response affidavit of LAWRENCE MILBERG, Esq., sworn to June 24, 1980.

Now, on motions of attorneys for defendants, it is ordered that motions No. 16, 31, 32, 33, 76 and 77 are consolidated for disposition; and it is further

ORDERED, that the motions for an order dismissing the complaint for failure to state a cause of action is granted; and it is further

Order of the New York Supreme Court, County of New York

ORDERED, that the complaint is dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the motion for class certification is denied.

/s/ H. G. S.
J.S.C.

FILED
SEP 11 1980
NEW YORK
Co. CLERK'S OFFICE

Order of the Appellate Division, First Judicial Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 19, 1981.

Present:

HON. THEODORE R. KUPFERMAN, *Justice Presiding.*
HAROLD BIRNS, LEONARD H. SANDLER, SAMUEL J. SILVERMAN, ARNOLD L. FEIN, *Justices.*

10108

MOSHE WEINREICH suing individually on his own behalf and representatively on behalf of a class of plaintiffs similarly situated,

Plaintiff-Appellant,

—against—

STATE-WIDE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, individually and representatively on behalf of a class of defendants similarly situated,

Defendants-Respondents,

and

ALL CITY INSURANCE COMPANY and EMPIRE MUTUAL CASUALTY INSURANCE COMPANY,

Defendants,

and

THE AETNA CASUALTY & SURETY COMPANY, AETNA INSURANCE COMPANY, AETNA LIFE INSURANCE COMPANY, AMERI-

CAN AUTOMOBILE INSURANCE CO., AMICA MUTUAL INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, ATLANTIC MUTUAL LIABILITY INSURANCE COMPANY, BANNER CASUALTY COMPANY, BUFFALO INSURANCE COMPANY, BOSTON OLD COLONY INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, CENTURY INDEMNITY COMPANY, COLONIAL PENN INSURANCE COMPANY, COMMERCIAL INSURANCE COMPANY OF NEWARK, N.J., COMMERCIAL UNION INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, COSMOPOLITAN MUTUAL INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, COUNTRY-WIDE INSURANCE COMPANY, CRITERION INSURANCE COMPANY, EMPLOYERS MUTUAL CASUALTY COMPANY, NEW JERSEY MANUFACTURERS INSURANCE COMPANY, NEWARK INSURANCE COMPANY, THE NORTH RIVER INSURANCE CO., PRUDENTIAL PROPERTY & CASUALTY COMPANY, FEDERAL INSURANCE COMPANY, FIDELITY & CASUALTY COMPANY OF NEW YORK, FIREMEN'S FUND INSURANCE COMPANY, FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD., GLOBE INDEMNITY COMPANY, GLENS FALLS INSURANCE COMPANY, GRAPHIC ARTS MUTUAL INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, THE GREATER NEW YORK MUTUAL INSURANCE COMPANY, GUARDIAN ROYAL EXCHANGE ASSURANCE COMPANY, HANOVER INSURANCE CO., HARTFORD CASUALTY INSURANCE COMPANY, THE HOME INSURANCE COMPANY, THE HOME INDEMNITY COMPANY, HOME INDEMNITY CO., IDEAL MUTUAL INSURANCE COMPANY, INSURANCE COMPANY OF GREATER NEW YORK, INSURANCE COMPANY OF NORTH AMERICA, LEATHERBY INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, LION INSURANCE COMPANY, THE LUMBERMEN'S MUTUAL INSURANCE COMPANY, LUMBERMEN'S MUTUAL

CAS. CO., MARYLAND CASUALTY COMPANY, MERCHANTS MUTUAL INSURANCE COMPANY, MICHIGAN MUTUAL LIABILITY COMPANY, NASSAU INSURANCE COMPANY, NATIONAL GRANGE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, ROYAL-GLOBE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, SAFECO INSURANCE COMPANY OF AMERICA, ST. PAUL FIRE & MARINE INSURANCE CO., SENTRY INSURANCE MUTUAL COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., TRANSAMERICA INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, TRAVELERS INDEMNITY COMPANY OF ILLINOIS, TRAVELERS INSURANCE COMPANY, UNDERWRITERS INSURANCE COMPANY, UNIGARD INSURANCE COMPANY, UNITED STATES FIDELITY & GUARANTY COMPANY, UTICA MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL INSURANCE COMPANY, ZURICH INSURANCE COMPANY, USAA CASUALTY INSURANCE COMPANY and VOLKSWAGEN INSURANCE COMPANY,

Defendants-Respondents.

An appeal having been taken to this Court by the plaintiff-appellant from an order of Supreme Court, New York County (H. Schwartz, J.), entered on September 11, 1980, which dismissed the complaint of plaintiff on the ground of failure to state a cause of action and denied his motion for class certification,

And said appeal having been argued by Mr. Jerome M. Congress of counsel for the plaintiff-appellant, by Mr. William E. Hegarty of counsel for defendants-respondents, except Maryland Casualty Company, by Mr. Eugene A. Leiman of counsel for defendant-respondent Maryland Casualty Company, and an amicus curiae brief having been

submitted by Mr. Robert S. Hammer, of counsel for the Superintendent of Insurance, in support of affirmance; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

/s/ JOSEPH J. LUCCHI
Clerk.

FILED
FEB 19 1981

Opinion of the Court of Appeals of the State of New York

MORRIS C. GURNEE, Appellant, v AETNA LIFE AND CASUALTY COMPANY, Respondent.

MOSHE WEINREICH, Appellant, v STATE-WIDE INSURANCE COMPANY et al., Respondents, et al., Defendants.

Argued January 12, 1982; decided February 18, 1982.

OPINION OF THE COURT

Chief Judge COOKE.

These cases present the question whether the holding of *Kurcsics* v. *Merchants Mut. Ins. Co.* (49 NY2d 451) should be given retroactive effect. For the outlined reasons, this court holds that *Kurcsics* should be applied to all claims not barred by the Statute of Limitations.

In *Kurcsics*, the court construed the phrase "first party benefits", contained in section 671 of the Insurance Law, as it related to no-fault insurance protection. The court held that under section 671, a covered person injured in a motor vehicle accident who sustained lost earnings of more than $1,000 per month can recover as first-party benefits 80% of his or her actual lost earnings up to a maximum of $1,000 per month. The court rejected the Superintendent of Insurance's interpretation of section 671 as limiting recovery for lost earnings to a maximum of 80% of $1,000, or $800.

Morris Gurnee, plaintiff in one of the instant actions, was injured in November, 1977 while driving a car owned by an insured of Aetna Life and Casualty Company. He claimed lost wages of more than $3,200 per month. Aetna paid him $800 per month, in accordance with State Insurance Department regulations. After this court decided

Kurcsics in February, 1980, Gurnee sued Aetna, claiming he was entitled to the maximum $1,000 per month for lost earnings. Supreme Court granted defendant's motion to dismiss the complaint for failure to state a cause of action, holding that *Kurcsics* should not be applied retroactively. That court also denied as academic plaintiff's motion to maintain the lawsuit as a class action. The Appellate Division affirmed.

Moshe Weinreich was injured in an accident in July, 1975 involving a vehicle insured by State-Wide Insurance Company. In the wake of *Kurcsics*, he sued State-Wide, alleging that it refused to pay him more than $800 per month in lost wages even though he was entitled to $1,000. Weinreich also moved for an order determining that the suit could be brought as a class action. Supreme Court granted defendant's motion to dismiss for failure to state a cause of action, holding that *Kurcsics* was not retroactive, and denied the motion for class certification. Appellate Division affirmance followed.

In determining whether the holding of *Kurcsics* is applicable to other claims that arose before the decision was handed down, it is questionable whether retroactivity analysis is relevant with respect to the application of the first decision of the State's highest court interpreting a new statute. Such analysis is traditionally used where there has been an abrupt shift in controlling decisional law. In *Kurcsics*, this court merely construed, at its first opportunity to do so, the language of a statute that had been in effect since 1974.

Even under what might be described as the traditional retroactivity analysis, however, it is clear that *Kurcsics* should be accorded full retroactive effect. Several prin-

ciples provide guidance for such examination. First, it is well established that, "consonant with the common law's policy-laden assumptions, a change in decisional law usually will be applied retrospectively to all cases still in the normal litigating process" (*Gager* v. *White*, 53 NY2d 475, 483; see *People* v. *Pepper*, 53 NY2d 213, 219-220; *People* v. *Morales*, 37 NY2d 262, 267-269; *Kelly* v. *Long Is. Light. Co.*, 31 NY2d 25, 29, n 3; *Knapp* v. *Fasbender*, 1 NY2d 212, 243). As an exception to this general rule, however, "where there has been such a sharp break in the continuity of law that its impact will 'wreak more havoc in society than society's interest in stability will tolerate'" a court may direct that the new pronouncement operate prospectively alone (*Gager* v. *White, supra*, at pp. 483-484, quoting Fairchild Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting", 51 Marq L Rev 254).

In *Chevron Oil Co.* v. *Huson* (404 US 97, 106-107), the Supreme Court outlined three factors to consider in determining if a ruling should be prospective only. "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (404 US, at p 106). Second, the prior history of the rule at issue and the impact of retroactive application upon its purpose and effect should be considered. Finally, the court should take into account any inequity that would be created by retroactive application (id.).

Turning to the instant cases, defendants argue that *Kurcsics* should not be applied retroactively because its

result was not clearly foreshadowed. In this regard it is important to emphasize that *Kurcsics* did not "establish a new principle of law." It merely construed a statute that had been in effect for a number of years. It is true that the Insurance Department had promulgated regulations based on a construction of section 671 contrary to that subsequently articulated by this court. A judicial decision construing the words of a statute, however, does not constitute the creation of a new legal principle. Additionally, the definitional language of section 671 itself foreshadowed the conclusion this court first had the opportunity to express in *Kurcsics*.

With respect to the second factor set forth in *Chevron*, defendants argue that the purposes of the legislation would not be furthered because retroactive application of *Kurcsics* would reduce neither insurance premium rates nor the number of law suits stemming from automobile accidents, both admittedly salutary goals of the no-fault scheme. In *Montgomery* v. *Daniels* (38 NY2d 41, 55), however, this court stated that a crucial facet of the Legislature's plan in enacting article 18 of the Insurance Law consisted of "guaranteeing prompt *and full* compensation of economic losses up to $50,000 without the necessity of recourse to the courts" (emphasis added). It is this right of an injured party to prompt and full compensation that offsets the no-fault law's elimination of the ability to recover for pain and suffering for relatively minor injuries (see NY Legis Ann, 1973, p 298; 2 McKinney's Session Laws of NY, 1973, p 2335). An important aspect of the no-fault scheme, then, was the provision of first-party benefits. "Full compensation" under the scheme includes the amount of lost earnings allowed by section 671. To argue that application of

the correct interpretation of section 671 will not further the purposes of the no-fault legislation is to ignore these crucial benefits. Indeed, to deny *Kurcsics* application to these cases would directly contradict the legislative design.

The third factor cited in *Chevron* entails weighing relative burdens that would be imposed upon either party if *Kurcsics* were given retroactive effect. Defendants maintain that they based their premium rates upon the assumption that their liability for lost earnings would be limited to $800 per month. They assert that a determination that their maximum liability was $1,000 per month would create severe financial hardships. Whatever hardships may be suffered by insurers who erroneously believed that their maximum exposure was $800 per month for lost earnings, however, is more than outweighed by the hardship suffered by those injured individuals who received only $800 per month for lost earnings although entitled to a maximum of $1,000 per month. As this court observed in *Montgomery* v. *Daniels* (38 NY2d 41, 55, *supra*), the no-fault legislation foreclosed recovery for pain and suffering by persons who had suffered relatively minor injuries in automobile accidents, but balanced this by providing a means of obtaining prompt and full recovery for certain economic losses. Plaintiffs were denied the ability to sue for pain and suffering, yet they were also denied the full recovery to which they were entitled under that scheme. The unfairness to such injured persons outweighs whatever financial burden may be imposed on insurers. With respect to this burden, it should be noted that the applicable six-year Statute of Limitations has already extinguished a portion of the insurers' potential liability (see CPLR 213).

When all of the applicable criteria are considered, retroactive application of *Kurcsics* is mandated. In sum, that case established no new principle of law; it merely construed the language of a statute that was already in existence. Also, the purposes of the no-fault insurance legislation would be furthered by retroactive application of *Kurcsics*. And, finally, a balancing of the equities dictates that the injured parties not be made to bear the burden of foregoing part of the recovery to which they were statutorily entitled.

Defendants also raise constitutional challenges to retroactive application of *Kurcsics*. These arguments, however, are unpersuasive. *Kurcsics* merely construed the language of a statute governing certain provisions required of automobile insurance contracts. Such a judicial construction cannot, by its very nature, constitute a "Law impairing the Obligation of Contracts" (US Const, art I, § 10, par 1). Likewise, retroactive application of *Kurcsics* effects no unconstitutional taking of property without due process. Requiring defendants to pay covered persons according to the command of a statute governing their insurance policies and in effect when those policies were written simply is not a "taking". There is thus no persuasive reason why this court's construction of section 671 should not be held applicable to all claims that are not time-barred. To the contrary, equitable considerations and the nature of this court's decision in *Kurcsics* require that *Kurcsics* be applied retroactively. Plaintiff's complaints therefore should not have been dismissed for failure to state a cause of action.

With respect to plaintiffs' motions for orders determining that they could bring their suits as class actions, this

court has no occasion at this point to address the merits. The motions were denied as academic, in one case explicitly and in the other implicitly, in light of the dismissals of plaintiffs' complaints for failure to state a cause of action. Given the inherently factual and discretionary nature of such determinations (see *Ray* v. *Marine Midland Grace Trust Co.*, 35 NY2d 147, 155; Siegel, New York Practice, § 147), the merits of the motions should first be explored and considered by the trial courts (see CPLR 901-909).

Accordingly, the orders of the Appellate Divisions should be reversed, with costs, and defendants' motions to dismiss the complaints should be denied.

Judges JASEN, GABRIELLI, JONES, WACHTLER and MEYER concur; Judge FUCHSBERG taking no part.

In *Gurnee* v. *Aetna Life & Cas. Co.*: Order reversed, with costs, and defendants' motions to dismiss the complaint denied.

In *Weinreich* v. *State-Wide Ins. Co.*: Order reversed, with costs, and defendants' motions to dismiss the complaint denied.

Order of the Court of Appeals Denying Reargument

Mo. No. 260

Morris C. Gurner, for Himself &c.

Appellant,

vs.

Aetna Life and Casualty Company, &c.

Respondent.

Moshe Weinreich, &c.,

Appellant,

vs.

State-Wide Insurance Company, et al.,

Respondents.

Decision Court of Appeals, March 25, 1982

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements.

Motion for a stay pending application to the United States Supreme Court for a writ of certiorari dismissed.

Motion for a stay referred to Chief Judge Cooke for determination pursuant to 28 U.S.C. sec. 2101(f).

Judge Fuchsberg took no part.

Opinion of the Court of Appeals of the State of New York in *Kurcsics* v. *Merchants Mutual Insurance Co.*

OTTO KURCSICS, Appellant v. MERCHANTS MUTUAL INSURANCE COMPANY, Respondent.

Argued January 2, 1980; decided February 20, 1980

OPINION OF THE COURT

JASEN, J.

This appeal raises a question of first impression in this court concerning the construction of the phrase "first party benefits" as used in article 18 of the Insurance Law (§§ 670-678), New York's Comprehensive Automobile Insurance Reparations Act, which provides no-fault insurance protection to "covered persons". Specifically, we are asked to decide whether a covered person who has sustained lost earnings in excess of $1,000 per month is entitled to recover as first-party benefits 80% of actual lost earnings with a maximum limitation of $1,000 per month, or, whether, such person's recovery is limited to only $800 per month as first-party benefits, such figure representing 80% of actual earnings "up to one thousand dollars per month."

The facts are undisputed and may be simply stated. On April 1, 1977, plaintiff Otto Kurcsics, while riding a motorcycle, was struck and injured by an automobile driven by one James Gantzer. A policy of automobile liability insurance issued to Gantzer by Merchants Mutual Insurance Co., defendant herein, complied with the requirements of section 672 of the Insurance Law and thus provided for the payment of first-party benefits to various classes of persons.[1]

---

[1] As correctly noted by the Appellate Division, an operator of a motorcycle at the time of the accident herein "was equated to

As a result of the accident and injury suffered, plaintiff submitted claims to defendant for payment of both medical expenses and lost wages.[2] Although plaintiff produced proper documentation of the fact that he had sustained a loss of $1,400 per month in wages since the time of the accident, defendant has paid him only $800 per month, contending that this amount is the maximum to which plaintiff is entitled. In contrast, plaintiff maintains that the statute specifically allows "up to one thousand dollars per month" for lost wages and not the sum of $800 as interpreted by the defendant.

This disagreement as to the amount of loss of earnings plaintiff is entitled to recover as first-party benefits spawned this litigation. By this action, plaintiff seeks a declaratory judgment construing section 671 of the Insurance Law as requiring first-party benefits to be paid for lost wages in the maximum sum of $1,000 per month and not $800 per month. Plaintiff also seeks to require defendant to pay him the remaining $200 per month to which he claims entitlement plus 2% interest thereon, and, in addition, attorney's fees expended in recovering the same.

Special Term, in an insightful opinion, held that plaintiff is entitled to $1,000 per month in compensation for lost earnings, reasoning that "[a] reading of section 671 (subd 1, par [b]) [of the Insurance Law] plainly indicates that

---

a pedestrian or bicyclist, and was a 'covered person' under subdivision 10 of section 671 of the Insurance Law." (65 AD2d, at p 193.) However, by amendment effective December 1, 1977, a motorcycle is considered to be a motor vehicle for purposes of the No-Fault Automobile Insurance Law and an injured rider or passenger of the motorcycle must seek compensation from the insurer thereof. (L 1977, ch 892, § 10, adding Insurance Law § 672, subd 6.)

[2] No question as to the medical expenses is raised on this appeal.

an injured person will be allowed to receive up to a maximum of $1,000 per month from the carrier for lost wages." (93 Misc.2d, at p. 283.) Special Term, however, denied plaintiff's request for interest and attorney's fees.

On appeal, a unanimous Appellate Division modified the judgment of Special Term by deleting therefrom "the provisions interpreting section 671 of the Insurance Law as requiring defendant to increase its monthly payments to plaintiff to the sum of $1,000 retroactive to April 1, 1977 and directing defendant to make such payments." (65 A.D. 2d, at p. 197.) The order of the Appellate Division should be reversed, and the case remitted to Special Term for the award of reasonable attorney's fees and interest.

The controversy in this case centers upon an ambiguity which is perceived to exist in section 671 of the Insurance Law. The term "basic economic loss" is defined to include as one of its components "loss of earnings from work which the injured person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to one thousand dollars per month for not more than three years from the date of the accident causing the injury." (Insurance Law, § 671, subd. 1, par [b].) In contrast, the phrase "first party benefits", as far as is applicable to this appeal, "means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less: (a) twenty percent of lost earnings pursuant to paragraph (b) of subdivision one of this section."

Defendant takes the position that inasmuch as its duty to compensate is couched in "first party benefit" terms (see

Insurance Law, § 672), its obligation for lost earnings cannot exceed the figure of $800 per month. Defendant arrives at this sum by reasoning that since first-party benefits are defined as basic economic loss less 20% of lost earnings as defined in section 671 (subd 1, par [b]) of the Insurance Law and, further, since loss of earnings as defined in such section have an outer limit of $1,000 per month, the 20% reduction works to limit recovery as first-party benefits for lost earnings to $800 per month.

Plaintiff, on the other hand, contends that since the Legislature has authorized expressly the recovery "up to one thousand dollars per month" for loss of earnings, the 20% reduction should not be interpreted as limiting this figure to read "up to $800" instead of $1,000 as clearly stated in the statute. Rather, plaintiff forwards as the reasonable and correct interpretation of these statutory provisions that the 20% deduction was intended to be computed against the gross amount of lost earnings claimed. Thus, an individual is entitled to actual lost earnings claimed less 20%, unless such reduced figure exceeds $1,000 per month, in which case such person would be entitled to a maximum of $1,000 due to the outer net limit imposed by section 671 (subd. 1, par [b]) of the Insurance Law. We agree with this contention.

There can be little doubt that the 20% deduction was included in the statutory scheme by the Legislature to prevent both windfall recovery to injured persons and financial hardship to insurance carriers. As has been stated: "[T]he 20% credit or deduction was designed to give the insurance carrier a monetary benefit based upon the fact that the lost earnings compensated under this law, are not includable in income for the purposes of federal income taxation and accordingly, since the claimant derives a benefit in that respect, the insurance carrier should share in said benefits

through the 20% deduction." (N.Y. No-Fault Arbitration Reports, NF-1, vol. 1, No. 1, Jan., 1977; see, also, *Strain* v. *Kechbaum*, 83 Misc.2d 1066, 1067; Comment, New York Adopts No-Fault: A Summary and Analysis, 37 Albany L. Rev. 662, 689-690; Report of Joint Legis. Committee on Ins. Rates, Regulation and Recodification of Insurance Law, N.Y. Legis. Doc., 1973, No. 18, p. 10.) Thus, by limiting first-party benefits to 80% of lost earnings, the Legislature has attempted to compensate the accident victim for the earnings he or she would have, in fact, realized, while, at the same time, ensuring that an unjustified financial burden is not thrust upon the insurance companies which would eventually be reflected in higher insurance premiums. In addition, the possible motivation for recovered accident victims to refrain from returning to work, if windfall recovery would be permitted, is minimized, if not entirely eliminated.

While the legislative purpose behind the enactment of the 20% deduction embodied in section 671 (subd. 1, par [b]) of the Insurance Law is readily identifiable, the issue to be resolved on this appeal remains whether the 20% deduction was intended to operate so as to limit recovery for loss of earnings to $800 per month, or whether it was meant to reduce only actual lost earnings claimed, thereby allowing a maximum recovery of $1,000 per month as first-party benefits. We believe that the statutory provisions support the latter interpretation.

Section 671 (subd. 1, par. [b]) of the Insurance Law provides that one of the components of "basic economic loss" is loss of earnings from work and further states, in unequivocal terms, that this amount shall not exceed "one thousand dollars per month for not more than three years from the date of the accident causing the injury." Thus, it is abundantly clear that this provision contemplates re-

covery for loss of earnings up to $1,000 per month, and we would be remiss in reading the 20% deduction embodied in section 671 (subd. 2, par. [a]) of the Insurance Law as rewriting paragraph (b) of subdivision 1 to limit the maximum recovery to $800 per month for loss of earnings. If the Legislature had so intended, section 671 (subd. 1, par. [b]) would limit recovery to $800 per month and not authorize, as it presently does, recovery "up to one thousand dollars per month" for loss of earnings. The 20% deduction should not be treated as taking away what benefits section 671 (subd. 1, par. [b]) bestows for "[i]t remains a basic principle of statutory construction that a court will 'not by implication read into a clause of a rule or statute a limitation for which * * * no sound reason [can be found] and which would render the clause futile.'" (*Matter of Industrial Comr. of State of N.Y.* v. *Five Corners Tavern*, 47 N.Y.2d 639, 646-647, quoting *Lederer* v. *Wise Shoe Co.*, 276 N.Y. 459, 465.)

In our opinion, the language of section 671 (subd. 2, par. [a]) which reads "lost earnings pursuant to paragraph (b) of subdivision one of this section" refers only to so much of paragraph (b) of subdivision 1 which defines lost earnings, to wit: "loss of earnings from work which the injured person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income". The $1,000 per month limitation embodied in section 671 (subd. 1, par. [b]) is not part and parcel of the definition of lost earnings, but, merely, represents the outer limit of recovery set down by the Legislature in the no-fault automobile insurance scheme. Thus, we hold today that an injured person can recover up to

$1,000 per month from the insurance carrier for lost earnings. The statutory scheme envisions nothing less.[3]

We recognize that the Superintendent of Insurance has interpreted the applicable provisions of section 671 of the Insurance Law as limiting recovery for lost earnings to $800 per month. (11 NYCRR 65.6 [n] [2] [xi].) Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. (*Matter of Howard* v. *Wyman*, 28 N.Y.2d 434; cf. *Ostrer* v. *Schenck*, 41 N.Y.2d 782, 786.) Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight. (See *Matter of Adams* [*Government Employees Ins. Co.*], 52 A.D.2d 118, 121.)[4]

---

[3] To recover the maximum of $1,000 per month, a claimant would be required to demonstrate that he or she suffered loss of earnings as defined in section 671 (subd 1, par [b]) in the amount of $1,250 or more. This is so because the 20% deduction would operate so as to reduce the gross loss of earnings claimed. If, for example, an injured person claims $1,100 in lost earnings, the 20% deduction works to reduce the amount recoverable to $880 ($1,000 minus [.20 × $1,100]).

[4] While it is true, as the dissenter observes, that the Legislature has not deemed it necessary to correct the superintendent's inter-

One final point requires comment. Plaintiff argues that he is entitled not only to the $200 per month which has been improperly withheld from him, but, in addition, should recover 2% interest per month on the overdue amount and the reasonable cost of attorney's fees in collecting the deficiency. We agree.

Subdivision 1 of section 675 of the Insurance Law expressly provides that "[a]ll overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion thereof was overdue and such claim was not paid before an attorney was retained with respect to the overdue claim, the claimant shall also be entitled to recover his attorney's reasonable fee." In accordance with this statutory mandate, plaintiff is entitled to the interest claimed and reasonable attorney's fees.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to Supreme Court, Special Term, Erie County, to award reasonable attorney's fees and interest claimed.

GABRIELLI, J. (dissenting). With respect, I must dissent.

The majority first embraces a rather strained interpretation of the statutory definition of first-party no-fault benefits and then proceeds to conclude that the contrary interpretation, which was adopted by the Superintendent of Insurance, is not entitled to the usual deference because it "runs counter to the clear wording of [the] statutory provisions". Since I am far from convinced that the language of the statute unambiguously supports the majority's reading of it, I would vote to uphold the interpretation of the

---

pretation, we would note that at the time the Legislature undertook the revision of the No-Fault Automobile Insurance Law, the question presented here—that this interpretation conflicts with legislative intent—had not been raised to alert the Legislature.

superintendent, who is, after all, charged with the responsibility of administering the complex provisions of the Insurance Law (*Ostrer* v. *Schenck*, 41 N.Y.2d 782, 786).

Indeed, a plain reading of the statutory provisions suggests that the superintendent's interpretation, which is embodied in Insurance Department regulations (11 NYCRR 65.6 [n] [2] [xi]), is the correct one. Under subdivision 1 of section 672 of the Insurance Law, the insurer is obligated to pay an injured claimant "first party benefits" if certain statutorily defined conditions are met. First-party benefits consist of the injured claimant's "basic economic loss" (see Insurance Law, § 671, subd. 2), which, in turn, includes "loss of earnings from work which the injured person would have performed had he not been injured * * * *up to one thousand dollars per month*" (Insurance Law, § 671, subd. 1, par. [b]; emphasis supplied). In order to compute the correct figure for monthly "first party benefits" under the statute, however, it is necessary to reduce the amount attributable to "lost earnings" by 20%. This deduction, as noted by the majority, was included in the statutory scheme as a means of making the "lost earnings" component of first-party benefits, which are not subject to income tax, roughly equivalent to the after-tax income that the claimant would have enjoyed had he not been injured (Report of the Joint Legis. Committee on Ins. Rates, Regulation and Recodification of the Insurance Law, N.Y. Legis. Doc., 1973, No. 18, p. 10).

In describing the manner in which the deduction is to be calculated, the Legislature clearly stated that the claimant's "basic economic loss" must be reduced by "twenty percent of lost earnings *pursuant to paragraph (b) of subdivision one of this section* [§ 671]" (Insurance Law, § 671,

subd. 2, par. [a]; emphasis supplied). I find the reference to section 671 (subd. 1, par. [b]) particularly significant because it suggests that the Legislature intended that the term "lost earnings" be construed as a statutory term of art whose meaning is to be ascertained by reference to that subdivision. In other words, it was the Legislature's intention to incorporate the entire statutory definition of "lost earnings" into section 671 (subd. 2, par. [a]) and then to apply the 20% reduction to the resulting figure. Since the statutory definition of "lost earnings" is circumscribed by a $1,000 per month maximum, it would seem that the figure against which the 20% reduction is to be applied can never exceed $1,000 per month. Accordingly, as the Superintendent of Insurance has concluded, the amount of first-party benefits that are attributable to "lost earnings" as a component of "basic economic loss" could never exceed $800 per month of $1,000 per month less 20%.

Having found the superintendent's interpretation of the statute to be an eminently reasonable one, I would carry the inquiry no further. The Legislature has vested in the superintendent the responsibility of overseeing the highly complex, interrelated provisions known collectively as the No-Fault Automobile Insurance Law (Insurance Law, art 18), and, hence, under existing legal principles, the superintendent's reading of the no-fault provisions is entitled to be accorded great weight (*Ostrer* v. *Schenck*, 41 N.Y.2d 782, 786, *supra;* see, also, *Breen* v. *Cunard Lines S.S. Co.*, 33 N.Y.2d 508, 511; cf. *Matter of Howard* v. *Wyman*, 28 N.Y.2d 434, 438). Moreover, the fact that the Legislature has not found it necessary to correct the superintendent's long-standing interpretation of section 671 (subd. 2, par. [a]) lends further support to the contention that this interpreta-

tion does not conflict with legislative intent. The Legislature is presumed to have been aware of the superintendent's interpretation, which was promulgated in the form of an Insurance Department regulation as early as 1974. Surely, if the Legislature had disapproved of the superintendent's interpretation of the statute, it would have acted to clarify the provision in 1977, when it undertook a major revision of the State's No-Fault Automobile Insurance Law (L 1977, ch. 892). I find this especially persuasive.

In an apparent recognition of the fact that the superintendent's construction of the statute is at least as reasonable as its own, the majority has found it necessary to announce a new rule for reviewing an administrative agency's interpretation of its governing statutes. Heretofore, it has been the unquestioned rule that the role of a reviewing court is limited to determining whether an agency regulation "is so lacking in reason for its promulgation that it is essentially arbitrary" (*Matter of Marburg* v. *Cole*, 286 N.Y. 202, 212). As we have previously observed, "'[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body'" (*Ostrer* v. *Schenck*, *supra*, at p. 786, quoting *Mississippi Val. Barge Co.* v. *United States*, 292 U.S. 282, 286-287; see *Matter of Dumbleton* v. *Reed*, 40 N.Y.2d 586, 590 [JONES, J., dissenting]; *Matter of Howard* v. *Wyman*, 28 N.Y.2d 434, 438, *supra*). Yet, despite the well-established practice of this court to refrain from substituting its judgment for that of the administrative agency charged with enforcing a statute, the majority has blandly asserted without further analysis that "there is little basis to rely on any special competence or expertise of the administrative agency". With this I cannot agree. Our prior

decisions in this area have been premised upon our conviction that the various administrative agencies, which are part of the executive branch of government, are entitled to have a significant role in the interpretation of legislative enactments. This is particularly so where, as here, the Legislature has delegated to the administrative agency the task of implementing complex and highly technical rules whose purpose is not always readily discernible to those who are unfamiliar with their interrelationships and practical application. Where the Legislature has entrusted a department head with the responsibility of carrying out its legislative design, we have always adhered to a policy of judicial restraint and have resisted the temptation to override the department head's judgment in cases involving questions of statutory interpretation. Indeed, we have intervened only when the department head's view is obviously irrational or is clearly contrary to the plain language of the enactment in question. This policy of deference, in my view, represents a proper balancing of the respective functions of the judicial and the executive branches of government. I regret that the majority has chosen to upset this balance by drastically altering a well-settled principle of law.

One further point remains to be discussed in this connection. The majority has implied that the superintendent's reading of section 671 (subd. 2, par. [a]) should be ignored because it contradicts the clear import of the statutory language. I must confess that I am unable to find any such contradiction. Presumably, the majority's view is based upon its assumption that the Legislature would have written an $800 per month maximum into the definition of "lost earnings" if it intended the recovery attributable to "lost

earnings" to be limited to that amount. An analysis of the entire legislative design, however, belies this assumption. In addition to being used in subdivision 2 of section 671 as a touchstone for measuring "first party benefits", the term "basic economic loss", which includes "lost earnings", is also used in subdivision 1 of section 673 to define the threshold amount of damages which must be sustained in order for an injured claimant to be permitted to maintain a common-law tort action (see *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 47). This alternate use of "basic economic loss" in the no-fault article, in my view, provides adequate explanation for the Legislature's decision not to incorporate the $800 per month limitation on recoverable lost earnings directly into the statutory definition of that term. Indeed, contrary to the majority's assertions, it seems perfectly reasonable to conclude that the Legislature intended the term "lost earnings" to be circumscribed by a $1,000 per month maximum for purposes of section 673 and, at the same time, intended that the $1,000 per month maximum be reduced by 20% for purposes of computing recoverable first-party benefits attributable to lost earnings.

In summary, I would stress that my disagreement with the majority stems not so much from our differing views concerning the proper interpretation of the statute as from the majority's apparent refusal to acknowledge that the statute is reasonably susceptible of more than one interpretation. In order to overcome the principle that the views of an administrative agency are entitled to great deference in matters of statutory interpretation, the majority has had to drastically curtail the application of that well-settled principle and, in the process, has overridden the superintendent's highly sensible reading of the statute. Yet, as the

foregoing discussion illustrates, the interpretation proffered by the Superintendent of Insurance is amply supported by both the language of the statute and the legislative design. Under such circumstances, our prior case law would seem to require that the court refrain from substituting its views for those of the administrative agency charged with implementing the statute (see *Matter of Marburg* v. *Cole*, 286 N.Y. 202, 212, *supra*).

For the foregoing reasons, I would affirm the order of the Appellate Division and uphold the existing Insurance Department regulations.

Chief Judge Cooke and Judges Jones, Wachtler, Fuchsberg and Meyer concur with Judge Jasen; Judge Gabrielli dissents and votes to affirm in a separate opinion.

Order reversed, with costs, and the case remitted to Supreme Court, Erie County, for further proceedings in accordance wtih the opinion herein.

Informational Brochure of the Department of Insurance

3) up to $25 per day for a year for other reasonable and necessary expenses you may have because of an injury resulting from an accident, such as the cost of hiring a housekeeper or necessary transportation expenses to and from a doctor.

Automobile owners may continue to buy additional no-fault insurance benefits above the minimum required by the no-fault law. Insurance companies will offer policies that cover more than the basic maximum of $50,000 in economic losses, and more than $1,000 per month for lost earnings.

How Much Will Health Providers Be Paid?

The law prohibits health providers such as doctors and hospitals from demanding or receiving fees from patients which exceed the amounts permitted in regulations issued by the Superintendent of Insurance. If your health provider renders an unusual or unique service, a higher fee may be paid by the insurer either voluntarily or under the direction of a medical arbitrator. An injured person should not pay any amount in excess of the fee schedules adopted by the Superintendent.

How Soon Will I Receive Payments?

The insurance company is required to make payment of no-fault benefits within 30 days after you supply proof of your losses. In order to be eligible for no-fault benefits, you must notify your insurer that you were in an accident as soon as possible but in no event more than 90 days following the accident, unless there are unusual reasons for not being able to file within that time. Written notification to your insurer is required. Your insurer will send you instructions on how to file a claim and the required claim forms. Remember, the sooner you file for benefits, the sooner you can be paid.

Will The Filing Of A Claim Affect Your Rates?

Filing a claim can affect your rates. Your auto insurance rates are based in part upon your experience. Therefore, you should make sure that any claim you file is proper. If you have any doubts or questions about your claim, you should contact your agent, broker or insurance company or call the Insurance Department at the phone number on the back of this pamphlet.

The auto premium rate that you are charged by your company must be filed and approved by the Insurance Department, so if you believe your premium rate may be wrong, you can verify your rate with the New York State Insurance Department. You may also ask your agent, broker or insurance company of ways you might be able to reduce rates. By filing only proper claims, questioning rates, and reporting possible wrongdoings to the authorities, you can help fight rising auto insurance costs.

Am I Insured When Driving Out-Of-State?

Most other states and the Canadian Provinces require that visiting motorists meet certain minimum insurance requirements. Depending on the State or Province, such minimum coverages may be some form of basic no-fault insurance or minimum amounts of the traditional liability insurance, or both.

Your New York policy automatically provides that you have the basic insurance required by other states. Your New York no-fault benefits and additional coverages, if you have them, will protect you and relatives living in your household for out-of-state accidents.

How Can I Lower My Insurance Costs?

It pays to comparison shop for insurance and this is as true for no-fault as for other types of insurance. You can reduce your insurance costs by: increasing your physical damage deductible for collision or comprehensive coverage above the standard $200 amount; or, if you have a car with low market value, eliminating one or both physical damage coverages entirely. Remember, you can never collect more than the market value of your car in a physical damage claim.

Where You Can Get More Information And Help

You should call on your insurance agent or broker, or contact your insurance company directly for information and assistance. If you need more information or help, phone or arrange to visit your New York State Insurance Department during normal business hours by calling:

New York City . . . . . (212) 775-1011
All other (toll free) . . . . . (800) 522-4370

You may write to the Insurance Department at:

Property and Casualty Insurance Bureau
New York State Insurance Department
Two World Trade Center
New York, New York 10047

New York State Insurance Department
Box 7312
Albany, New York 12224

The New York State Insurance Department is an Equal Employment Opportunity and Affirmative Action Employer. In accordance with State Law, Governor's Executive Order #40, and Section 504 of the Federal Rehabilitation Act of 1973, as amended, the State of New York does not discriminate against handicapped persons in access to employment, during employment or in any of its programs or activities.

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

HUGH L. CAREY
Governor

To the Insurance Buying Public:

No-fault automobile insurance has served our State well by providing faster payment for losses and more insurance coverage for the average New Yorker. However, costs must be contained, so your State government revised the no-fault law to eliminate lawsuits involving non-serious injuries, control medical costs, and stop some duplicate payments. In addition, the new law closed certain gaps in coverage and increased the number of people covered.

This brochure is designed to give you an overview of the benefits available under the no-fault law. For the specific terms of your no-fault coverage, including exclusions, you should read your policy carefully.

Your State Insurance Department has written this general brochure to tell you . . .

WHAT YOU SHOULD KNOW ABOUT THE REVISED NO-FAULT AUTOMOBILE INSURANCE LAW

Sincerely,

Hugh L. Carey

State of New York
Insurance Department
Albert B. Lewis
Superintendent of Insurance

KEEP THIS WITH YOUR POLICY

What Are The Changes From the Old Law?

This brochure contains important information about your auto insurance. Please read it carefully and keep it with your policy for future reference.

The revised no-fault automobile insurance law became effective December 1, 1977. Generally, the law covers all occupants of motor vehicles who are involved in accidents within New York State, except for motorcycle drivers and their passengers. Pedestrians injured in the State by motor vehicles and motorcycles are also covered. In addition, you and relatives living in your household may also be covered for out-of-state accidents.

The prompt payment feature of no-fault remains the same. You receive payment from your insurer instead of having to pay bills and expenses out of your own funds while waiting for the results of a lawsuit. This means that if you are invovled in an accident, your insurance company pays you, your passengers or any pedestrian injured by your car for economic losses (wage loss, medical and other related expenses as they occur) regardless of who actually caused the accident. The other driver's insurance company pays the wage losses and medical bills of the driver, passenger or any pedestrian injured by the other car.

Economic losses of up to $50,000 per person are covered under no-fault, but higher coverages are available at your option for an additional charge.

In summary, the important advantages of no-fault insurance continue to be:

1) prompt and sure payment for losses;
2) elimination of lawsuits for non-serious injuries;
3) rehabilitation of accident victims; and
4) the existence of standard minimum coverages.

The revised no-fault law contains several new provisions which are now a standard part of your basic no-fault insurance coverage:

1) Your right to sue for pain and suffering is now determined only by the seriousness of your injuries instead of the dollar amount of your medical bills.
2) You and your relatives living with you may be covered for out-of-state accidents.
3) A $2,000 auto accident death benefit has been added to the basic coverage.
4) Pedestrians injured by motorcycles are eligible for no-fault benefits from the motorcycle's insurer; however, drivers and passengers of motorcycles are no longer covered by no-fault when involved in an accident with an automobile.
5) No-fault benefits duplicating Medicare benefits are mostly eliminated as are some other duplicate benefits. Your insurer will pay the Medicare co-insurance and deductible amounts. As a result, if you are eligible, your no-fault premiums may be reduced.
6) Charges for health service costs are limited by fee schedules established or adopted by the Superintendent of Insurance.
7) New York State Disability Benefits are restored to automobile accident victims and such benefits will be deducted from the $50,000 no-fault package.
8) Occupants of a bus or school bus will generally look to their own insurer for no-fault benefits.
9) New arbitration procedures have been established and the filing fee for arbitration of a denied or overdue claim has been reduced from $25 to $15.
10) Victims of accidents involving uninsured motor vehicles in New York State who are not covered under any no-fault policy can now obtain no-fault benefits from the Motor Vehicle Accident Indemnification Corporation (MVAIC).

Where Do I File A Claim?

Generally, you are required to file your no-fault claim with the insurer of the car you were in when the accident occurred. If you are a pedestrian, you file with the insurer of the automobile that struck you.

If you are injured in or by an uninsured vehicle, you should file your no-fault claim with your own automobile insurer, or if you do not own an automobile, you should file your claim with the insurer of any automobile in your family's household. If you are not covered by any auto insurance of your own or your family's and you are injured by an uninsured vehicle, you should immediately report your accident to the police and within 90 days of the accident file a no-fault and liability claim with the Motor Vehicle Accident Indemnification Corporation (MVAIC), 116 John Street, New York, New York 10038.

Do I Have The Right To Sue?

Your right to sue a negligent driver for property damage is not affected by no-fault, but your right to sue for personal injuries is limited to cases involving: 1) serious injury as defined by the revised law; 2) death resulting from injuries; and 3) economic losses that are greater than those for which your basic no-fault coverage provides (for example, losses above $50,000 or wage loss in excess of $1,000 per month). In the case of serious injury, in addition to receiving no-fault benefits you can also sue for "pain and suffering", as well as economic loss that exceeds the basic no-fault coverage.

"Serious injury" is a technical term defined in the law as:

"[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

Can I Be Sued?

Yes. Just as you may sue in some situations, you may also be sued if you are a negligent driver: (1) for property damage, and (2) for personal injury losses in one of the three cases mentioned above.

Therefore, you and all other automobile owners are still required to carry minimum liability insurance (bodily-injury coverage for up to $10,000 per person and $20,000 per accident, and property damage coverage of $5,000). As always, you have the choice of buying higher amounts of liability insurance. Remember, collision and comprehensive coverage are not included in no-fault and are not required by law.

What Are The Amounts Of Basic No-Fault Benefits?

If an auto accident occurs in New York State, your insurance company will pay up to $50,000 in basic economic losses to you, $50,000 to each injured occupant of your car and $50,000 to each pedestrian injured by your car. For an accident occurring out of New York, only you as the insured person and your relatives living in the household are protected when injured in an automobile accident.

However, benefits may be less than the injured person's actual loss, because only 80% of lost earnings up to a maximum of $800 per month is payable. Benefits will be reduced by a deductible if there is one, as well as by benefits that are payable by Workmen's Compensation, Social Security Disability, New York State Disability Benefits (DBL), Medicare benefits, and certain employer "wage continuation" plans where an employee does not lose any future sick leave benefits.

Included in the coverage of $50,000 per person in economic losses, the basic no-fault benefits are:

1) all necessary health service expenses payable in accordance with fee schedules established or adopted by the New York State Insurance Department;
2) lost earnings up to $1,000 per month for three years, less 20% because the benefit payments, unlike earnings, will not be taxable; and

Claim Form Letter

NEW YORK MOTOR VEHICLE NO-FAULT INSURANCE LAW
COVER LETTER

[Name and address of Insurer or self-insurer]*

[Name of Insurer's Claim Representative
Address of Representative
Phone Number of Representative]*

Date Policyholder Policy Number

Date of Accident File Number

[Name and Address of Applicant]*

Dear Applicant:

This will acknowledge receipt of notice that you may have sustained injuries in the above captioned accident. The New York No-Fault Law provides for the payment of benefits to victims of motor vehicle accidents to reimburse them for their basic economic loss. Briefly summarized, basic economic loss consists of the following:

a. necessary medical and rehabilitation expenses,

b. loss of earnings of up to $1,000 per month for up to three years, less 20% because these benefits are not taxable ($800 per month maximum collectible),

c. up to $25 per day for up to one year for other reasonable and necessary expenses incurred on account of the injury, and

d. a $2,000 death benefit.

Additional benefits may be owed to you if the above policy has been endorsed to include optional additional coverage.

[NOTE. The No-Fault Law provides that if you are injured on a bus or a school bus in New York State, no-fault benefits must be paid by your auto insurer or if you have no auto, the auto insurer of a relative with whom you reside. The law further provides that you should only file a no-fault claim with us if there is no such auto policy in your household. The above rule does not apply and you may file a no-fault claim with us if you are the operator, owner or employee of the owner of the bus company.] **

In determining the benefits payable to you under the No-Fault Law, amounts recovered or recoverable on account of this accident from Workmen's Compensation, New York State Disability, Medicare, and certain wage continuation plans will reduce your no-fault benefits. Therefore, if you are entitled to any of these benefits you should make your claim for them promptly.

To enable us to determine if you are entitled to any no-fault benefits, please complete, SIGN and immediately return the enclosed *Application for Motor Vehicle No-Fault Benefits* along with copies of any bills you have received to date.

You are entitled to receive health service benefits without any time limit if it is possible to determine during the first year after the accident that further health services may be required after the first year. As you receive additional

medical bills or any other bills which you believe to be covered send them to us. We will reimburse you as soon as we are able to verify that they are covered expenses under no-fault. Please identify all communications with us with the file number shown above. Should you have any questions concerning your claim, we will be most happy to assist you. Please feel free to call us at the above phone number.

Very truly yours,

•

.....

IMPORTANT REMINDER

PLEASE ANSWER ALL QUESTIONS ON THE APPLICATION FORM AND SIGN BOTH AUTHORIZATIONS SO THAT WE MAY GIVE PROMPT ATTENTION TO YOUR CLAIM.

* Bracketed language to be filled in by insurer or self-insurer.

** Bracketed language to be used only by insurers of buses and school buses or self-insured buses or school buses.

APPENDIX OF CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

CONTENTS

PAGE

Relevant Provisions of the Constitution of the United States 1s

Article XVIII of the New York Insurance Law 2s

Pertinent Regulations of the New York Department of Insurance 20s

Constitutional Provisions

Article I, Section 10 of the United States Constitution provides, in part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

The Fifth Amendment to the United States Constitution provides, in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides, in part:

> ". . . no State . . . shall deprive any person of life, liberty, or property, without due process of law. . . ."

Statutory Provisions

(New York Insurance Law, Article XVIII)*

COMPREHENSIVE AUTOMOBILE INSURANCE REPARATIONS ACT

§ 670. Title.

This article shall be known as the "Comprehensive Automobile Insurance Reparations Act."

§ 671. Definitions.

1. "Basic economic loss" means, up to fifty thousand dollars per person:

(a) all necessary expenses incurred for: (i) medical, hospital, surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services; (ii) psychiatric, physical and occupational therapy and rehabilitation; (iii) any non-medical remedial care and treatment rendered in accordance with a religious method of healing recognized by the laws of this state; and, (iv) any other professional health services; all without limitation as to time, provided that within one year after the date of the accident causing the injury it is ascertainable that further expenses may be incurred as a result of the injury;

(b) loss of earnings from work which the injured person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to one thousand dollars per month for not more than three years from the date of the accident causing the injury; and

---

* As in effect on February 20, 1980.

(c) all other reasonable and necessary expenses incurred, up to twenty-five dollars per day for not more than one year from the date of the accident causing the injury.

The items of basic economic loss in this subdivision are all subject to the limitations and requirements of section six hundred seventy-eight of this article.

"Basic economic loss" shall not include any loss incurred on account of death; subject, however, to the provisions of paragraph (c) of subdivision one of section six hundred seventy-two of this article.

For the purpose of determining basic economic loss, the expenses incurred under paragraph (a) of this subdivision shall be in accordance with the limitations of section six hundred seventy-eight of this article. An employee who is entitled to receive monetary payments, pursuant to statute or contract with the employer, or who receives voluntary monetary benefits paid for by the employer, by reason of such employee's inability to work because of personal injury arising out of the use or operation of a motor vehicle, shall not be entitled to receive first party benefits for "loss of earnings from work" to the extent that such monetary payments or benefits from the employer do not result in the employee suffering a reduction in income or a reduction in such employee's level of future benefits arising from a subsequent illness or injury.

2. "First party benefits" means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less:

(a) twenty percent of lost earnings pursuant to paragraph (b) of subdivision one of this section;

(b) amounts recovered or recoverable on account of such injury under state or federal laws providing social security

disability benefits, or workmen's compensation benefits, or disability benefits under article nine of the workmen's compensation law, or medicare benefits (other than lifetime reserve days and provided further that the medicare benefits utilized herein do not result in a reduction of such person's medicare benfits for a subsequent illness or injury); and

(c) any amounts deductible under the applicable insurance policy.

3. "Non-economic loss" means pain and suffering and similar nonmonetary detriment.

4. "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ, or member; significant limitation of use of a bodyfunction or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

5. "Owner" shall have the meaning ascribed in section one hundred twenty-eight of the vehicle and traffic law.

6. "Motor vehicle" shall have the meaning ascribed in section three hundred eleven of the vehicle and traffic law, except that (a) it shall also include fire and police vehicles, and (b) it shall not include a motorcycle, as such term is defined in section one hundred twenty-three of the vehicle and traffic law.

7. "Insurer" means the insurance company or self-insurer, as the case may be, which provides the financial security required by article six or eight of the vehicle and traffic law.

8. "Member of his household" means a spouse, child or relative of the named insured who regularly resides in his household.

9. "Uninsured motor vehicle" means a motor vehicle, the owner of which is (a) a financially irresponsible motorist (as defined in subdivision j of section six hundred one of this chapter) or (b) unknown and whose identity is unascertainable.

10. "Covered person" means any pedestrian injured through the use or operation of, or any owner, operator or occupant of, a motor vehicle which has in effect the financial security required by articles six or eight of the vehicle and traffic law or which is referred to in subdivision two of section three hundred twenty-one of such law; or any other person entitled to first party benefits.

§ 672. Entitlement to first party benefits; additional financial security required.

1. Every owner's policy of liability insurance issued on a motor vehicle in satisfaction of the requirements of articles six or eight of the vehicle and traffic law shall also provide for; every owner who maintains another form of financial security on a motor vehicle in satisfaction of the requirements of such articles shall be liable for; and every owner of a motor vehicle required to be subject to the provisions of this article by subdivision two of section three hundred twenty-one of the vehicle and traffic law shall be liable for; the payment of first party benefits to:

(a) persons, other than occupants of another motor vehicle or a motorcycle, for loss arising out of the use or operation in this state of such motor vehicle; provided that, in the case of occupants of a bus or school bus (as defined in sections one hundred four and one hundred forty-two of the vehicle and traffic law) other than operators, owners, and employees of the owner or operator of such bus or school bus, the coverage for first party benefits for such occupants shall be afforded under the policy or policies, if any, providing first party benefits to the injured person and members of his household for loss arising out of the use or operation of any motor vehicle of such household, and in the event there is no such policy or policies, then first party benefits shall be provided by the insurer of such bus or school bus; and

(b) the named insured and members of his household, other than occupants of a motorcycle, for loss arising out of the use or operation of an uninsured motor vehicle and, outside of this state, of an insured motor vehicle; and

(c) the estate of any covered person, other than an occupant of another motor vehicle or a motorcycle, as a death benefit in the amount of two thousand dollars for the death of such person arising out of the use or operation of such motor vehicle, such amount being in addition to any first party benefits for basic economic loss.

2. An insurer may exclude from coverage required by subdivision one a person who (a) intentionally causes his own injury; (b) is injured as a result of operating a motor vehicle while in an intoxicated condition or while his ability to operate such vehicle is impaired by the use of a drug (within the meaning of section eleven hundred ninety-two of the vehicle and traffic law); or (c) is injured while he is:

(i) commiting an act which would constitute a felony, or seeking to avoid lawful apprehension or arrest by a law enforcement officer, or

(ii) operating a motor vehicle in a race or speed test, or

(iii) operating or occupying a motor vehicle known to him to be stolen.

3. Each insurance company which offers insurance to satisfy the requirements of subdivision one of this section shall offer such insurance without a deductible and with a family deductible of up to two hundred dollars (which deductible should apply only to the loss of the named insured and members of his household.) The superintendent may approve a higher deductible in the case of insurance policies providing additional benefits or pursuant to a plant designed an implement to coordinate first party benefits with other benefits.

4. Insurance policy forms for insurance to satisfy the requirements of subdivision one of this section shall be subject to approval pursuant to articles seven-A and eight of this chapter. Minimum benefit standards for such policies and for self-insurers, and rights of subrogation, examination and other such matters, shall be established by regulation pursuant to section twenty-one of this chapter.

5. Every owner's policy of liability insurance issued in satisfaction of articles six or eight of the vehicle and traffic law shall also provide, when a motor vehicle covered by such policy is used or operated in any other state or in any Canadian province, insurance coverage for such motor vehicle at least in the minimum amount required for such vehicle by the laws of such other state or Canadian province.

6. Every owner's policy of liability insurance issued on a motorcycle in satisfaction of the requirements of articles six or eight of the vehicle and traffic law shall also provide for; every owner who maintains another form of financial security on a motorcycle in satisfaction of the requirements of such articles shall be liable for; and every owner of a motorcycle required to be subject to the provision of this article by subdivision two of section three hundred twenty-one of the vehicle and traffic law shall be liable for; the payment of first party benefits to persons, other than the occupants of such motorcycle, another motorcycle, or any motor vehicle, for loss arising out of the use or operation within this state of such motorcycle; provided, however, that every insurer and self-insurer may exclude from the coverage required by this subdivision a person who intentionally causes his own injury or is injured while committing an act which would constitute a felony, or while seeking to avoid lawful apprehension or arrest by a law enforcement officer.

7. A company authorized to provide the insurance specified in subdivision three of section forty-six of this chapter or a corporation organized pursuant to article nine-c of this chapter may, individually or jointly, with the approval of the superintendent upon a showing that the company or corporation is qualified to provide for all of the items of basic economic loss specified in paragraph (a) of subdivision one of section six hundred seventy-one of this chapter, provide coverage for such items of basic economic loss to the extent that an insurer (as defined in this article) would be required to provide therefor. Where a policyholder elects to be covered under such an arrangement the insurer providing coverage for the automobile shall be furnished with the names of all persons covered by the company or

corporation under the arrangement and such named persons shall not be entitled to benefits for any of the items of basic economic loss specified in paragraph (a) of subdivision one of section six hundred seventy-one. The premium for the automobile insurance policy shall be appropriately reduced to reflect the elimination of coverage for such items of basic economic loss. Coverage by the automobile insurer of such eliminated items of basic economic loss shall be effected or restored upon request therefor by the insured and payment of the premium for such coverage. All companies and corporations providing coverage for items of basic economic loss pursuant to the authorization of this subdivision shall have only those rights and obligations which are applicable to an insurer subject to this article.

§ 673. Causes of action for personal injury.

1. Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss. The owner, operator or occupant of a motorcycle which has in effect the financial security required by article six or eight of the vehicle and traffic law, or which is referred to in subdivision two of section three hundred twenty-one of such law, shall not be subject to an action by or on behalf of a covered person for recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.

2. In any action by or on behalf of a covered person, against a non-covered person, where damages for personal injuries arising out of the use or operation of a motor vehi-

cle or a motorcycle may be recovered, an insurer which paid or is liable for first party benefits on account of such injuries shall have a lien against any recovery to the extent of benefits paid or payable by it to the covered person. No such action may be compromised by the covered person except with the written consent of the insurer, or with the approval of the court, or where the amount of such settlement exceeds fifty thousand dollars. The failure of such person to commence such action within two years after the accrual thereof shall operate to give the insurer a cause of action for the amount of first party benefits paid or payable against any person who may be liable to the covered person for his personal injuries, which cause of action shall be in addition to the cause of action of the covered person; provided, however, that in any action subsequently commenced by the covered person for such injuries, the amount of his basic economic loss shall not be recoverable.

3. Where there is no right of recovery for basic economic loss, such loss may nevertheless be pleaded and proved to the extent that it is relevant to the proof of noneconomic loss.

§ 674. Settlement between insurers.

1. Any insurer liable for the payment of first party benefits to or on behalf of a covered person shall have the right to recover the amount of such benefits so paid from the insurer of any other covered person if and to the extent that such other covered person would have been liable, but for the provisions of this article, to pay damages in an action at law. Such right to recover shall exist, however, only if at least one of the motor vehicles involved is a motor vehicle weighing more than six thousand five hundred pounds

unloaded or is a motor vehicle used principally for the transportation of persons or property for hire; provided, however, that in the case of occupants of a bus or school bus (as defined in sections one hundred four and one hundred forty-two of the vehicle and traffic law) other than operators, owners, and employees of the owner or operator of such bus or school bus, an insurer which, pursuant to the requirements of paragraph (a) of subdivision one of section six hundred seventy-two of this article, provides coverage for first party benefits for such occupants under the policy or policies providing first party benefits to the injured person and members of his household for loss arising out of the use or operation of any vehicle of such household, shall have no right to recover the amount of such benefits from the insurer of such bus or school bus.

2. The sole remedy of any insurer to recover on a claim arising under subdivision one of this section, shall be the submission of the controversy to mandatory arbitration pursuant to procedures to be promulgated or approved by the superintendent. Such mandatory arbitration procecedures shall also be utilized to resolve all disputes arising between insurers concerning their responsibility for the payment of first party benefits.

3. The liability of an insurer imposed by this section shall not affect or diminish its obligations under any policy of bodily injury liability insurance.

4. (a) "Compensation provider", for the purposes of this means the state insurance fund or the person, association, corporation or insurance carrier or statutory fund liable under state or federal laws for the payments of workers' compensation law.

(b) Any compensation provider liable for the payment of workers' compensation benefits under state or federal laws or disability benefits under article nine of the workers' compensation law, to or on behalf of a covered person shall have the right to recover the amount of such benefits so paid which were in lieu of first party benefits which another insurer would otherwise have been obligated to pay pursuant to section six hundred twenty-one-a or subdivision one of section six hundred seventy-two of this chapter from the insurer of any other covered person if and to the extent that such other covered person would have been liable, but for the provisions of this article, to pay damages in an action at law. Such right to recover shall exist, however, only if at least one of the motor vehicles involved in a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire; provided, however, that in the case of occupants of a bus or school bus (as defined in section one hundred four and one hundred forty-two of the vehicle and traffic law) other than operators, owners and employees of the owner or operator of such bus or school bus, a compensation provider shall have no right to recover the amount of such benefits from the insurer of such bus or school bus.

(c) The sole remedy of any compensation provider to recover on a claim arising under paragraph (b) of this subdivision shall be the submission of the controversy to mandatory arbitration pursuant to procedures to be promulgated or approved by the superintendent.

§ 675. Fair claims settlement.

1. Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such

benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion thereof was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, which shall be subject to limitations promulgated by the superintendent in regulations.

2. Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party benefits, or additional first party benefits, the amount thereof or any other matter which may arise under subdivision one of this section to arbitration pursuant to simplied procedures to be promulgated or approved by the superintendent.

An award by an arbitrator may be vacated or modified by a master arbitrator in accordance with simplified procedures to be promulgated or approved by the superintendent. The grounds for vacating or modifying any arbitrator's decision by a master arbitrator shall not be limited to those grounds for review set forth in article seventy-five of the civil practice law and rules. The decision of an arbitrator shall be binding except where vacated or modified by a master arbitrator. The decision of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive of interest and attorney's fees, the insurer or the

claimant may institute an action in a court of competent jurisdiction to adjudicate the dispute de novo.

§ 676. Coverage for non-resident motorists driving in this state.

Every insurer authorized to transact or transacting business in this state, or controlling or controlled by or under common control by or with an insurer authorized to transact or transacting business in this state, which sells a policy providing motor vehicle liability insurance coverage, or any similar coverage, in any state or Canadian province shall include in each such policy coverage to satisfy the financial security requirements of articles six or eight of the vehicle and traffic law and to provide for the payment of first party benefits pursuant to subdivision one of section six hundred seventy-two of his chapter when a motor vehicle covered by such policy is used or operated in this state, and every such policy shall be construed as if such coverage were embodied therein.

§ 677. Return to insureds of premium savings.

1. On or before November first, nineteen hundred seventy-three, each insurer shall file with the superintendent the schedule of rates, rating plans, rating rules and rate manuals, together with the supporting information required by section one hundred seventy-eight of this chapter, which it proposes to use in connection with the insurance required by section six hundred seventy-two of this chapter and by articles six and eight of the vehicle and traffic law. Such rates, rating plans, rating rules and rate manuals shall not be made effective until they have been approved by the superintendent, notwithstanding any inconsistent provisions of article seven-A of this chapter.

2. The policy premium to be charged by each insurer in connection with the insurance required by section six hundred seventy-two and bodily injury liability insurance required by law shall be at least fifteen percent or, with a two hundred family deductible, twenty percent below such insurer's policy premium in effect on January first, nineteen hundred seventy-three, for bodily injury liability insurance required by law and medical payments insurance; provided, however, that such reductions shall be greater to the extent that the superintendent determines that industry average premiums in effect on November first, nineteen hundred seventy-three, are lower than industry average premiums in effect on January first, nineteen hundred seventy-three. Actuarially commensurate adjustments shall be required in the case of other combinations of coverage.

3. On or before January fifeenth, nineteen hundred seventy-four, nineteen hundred seventy-five and nineteen hundred eighty-one, the superintendent shall file with the governor and the legislature a report showing the rates for the coverages provided for in section six hundred seventy-two, bodily injured liability insurance and medical payments insurance and evaluating the operation of this subdivision. The report required to be filed on or before January fifteenth, nineteen hundred eighty-one shall also contain a recommendation as to the continuance of this subdivision. Between February first nineteen hundred seventy-four and December thirty-first, nineteen hundred eighty-one, no changes in such rates, rating plans, rating rules and rate manuals, or in the rates, rating plans, rating rules and rate manuals applicable to motor vehicle property damage liability insurance or insurance for loss or damage to a motor vehicle, shall be made effective until they have been approved by the superintendent, notwith-

standing any inconsistent provisions or of article seven-A of this chapter; provided, however, that changes in such rates, rating plans, rating rules and rate manuals may be made effective without such approval if the rates which result from such changes are no higher than the insurer's highest rates in effect at any time after the effective date of this act. The provisions of this subdivision shall be applicable only to policies covering losses or liabilities arising out of ownership, operation or use of a motor vehicle:

(a) predominantly used for nonbusiness purposes, when a natural person is the named insured under a policy of automobile insurance; or (b) used principally for the transportation of persons for hire, including a bus or a school bus as defined in sections one hundred four and one hundred forty-two of the vehicle and traffic law.

4. Each insurer which has in effect on February first, nineteen hundred seventy-four, with a previous inception date, an owner's policy of liability insurance shall compute and refund to the insured (no later than the next renewal date of the policy) the difference, if any, between (i) the unearned portion of the policy premium atttributable to bodily injury liability insurance and medical payments insurance and (ii) the premium to be charged for such period for the coverages provided for in section six hundred seventy-two of this article and bodily injury liability and medical payments insurance.

5. In accordance with regulations prescribed by the superintendent, each insurer issuing policies which are subject to this article, including policies of motor vehicle personal injury insurance or policies of motor vehicle property damage liability insurance or insurance for loss

or damage to a motor vehicle shall establish a fair, practicable and nondiscriminatory plan for refunding or otherwise crediting to those purchasing such policies their share of the insurer's excess profit, if any, on such policies. An excess profit shall be a profit beyond such percentage rate of return on net worth attributable to such policies, as computed in accordance with the regulation required by subdivision three of section one hundred seventy-eight of this chapter, as is determined by the superintendent to be so far above a reasonable average profit as to amount to an excess profit (taking into consideration the fact that losses or profits below a reasonable average profit not be recouped from such policy-holders). Each such plan shall apply to policy periods between January first, nineteen hundred seventy-four and December thirty-first, nineteen hundred eighty-two. In prescribing such regulations the superintendent may limit the duration of such plans, waive any requirement for refund or credit which he determines to be de minimis or impracticable, adopt forms of returns which shall be made to him in order to establish the amount of any refund or credit due, establish periods and times for the determination and distribution of refunds and credits, and shall provide that insurers receive appropriate credit against any refunds or credits required by any such plan for policy-holder dividends and for return premium which may be due under rate credit or retrospective rating plans based on experience.

6. Where the principal operator of a motor vehicle or such operator's spouse is eligible for medicare benefits for items of basic economic loss specified in paragraph (a) of subdivision one of section six hundred seventy-one of this article, or where the insurer's obligation to pay first party benefits for loss of earnings from work is reduced

by virtue of the provisions of the last paragraph of subdivision one of section six hundred seventy-one of this article, the premium attributable to coverage under the automobile insurance policy for such items shall be appropriately modified to reflect the insurer's reduced exposure to loss.

§ 678. Limitations of charges by providers of health services.

1. The charges for services specified in paragraph (a) of subdivision one of section six hundred seventy-one of this article and any further health service charges which are incurred as a result of the injury and which are in excess of basic economic loss, shall not exceed the charges permissible under the schedules prepared and established by the chairman of the workmen's compensation board for industrial accidents, except as otherwise provided in section thirteen-a of the workmen's compensation law.

2. The superintendent, after consulting with the chairman of the workmen's compensation board and the commissioner of health, shall promulgate rules and regulations implementing and coordinating the provisions of this article and the workmen's compensation law with respect to charges for the professional health services specified in paragraph (a) of subdivision one of section six hundred seventy-one of this article, including the establishment of schedules for all such services for which schedules have not been prepared and established by the chairman of the workmen's compensation board.

3. No provider of health services specified in paragraph (a) of subdivision one of section six hundred seventy-one of this article may demand or request any payment in

addition to the charges authorized in subdivisions one and two of this section. Insurers shall report to the commissioner of health any patterns of overcharging, excessive treatment or other improper actions by a health provider within thirty days after such insurer has knowledge of such pattern.

Regulatory Provisions

(Pertinent Regulations of the Insurance Department of the State of New York)*

Regulation 68, 11 NYCRR § 65.6(n)(2)(xi) provides:

• • • • •

(xi) Maximum amount payable under mandatory coverage for loss of earnings from work. The $1,000 monthly work loss limitation on basic economic loss, when reduced by the statutory 20-percent offset, results in a maximum payable first-party benefit, for loss of earnings from work under the mandatory coverage, of $800 per month.

• • • • •

Regulation 68, 11 NYCRR § 65.15(n)(2)(xi) provides:

• • • • •

(xi) Maximum amount payable under mandatory coverage for loss earnings from work. The $1,000 monthly work loss limitation on basic economic loss, when reduced by the statutory 20-percent offset, results in a maximum payable first-party benefit for loss of earnings from work under the mandatory coverage of $800 per month.

• • • •

* As in effect on February 20, 1980.

81 -2348

No. .....

Office - Supreme Court, U.S.
FILED
SEP 23 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AETNA LIFE AND CASUALTY COMPANY,

Petitioner,

—against—

MORRIS C. GURNEE,

Respondent.

STATE-WIDE INSURANCE COMPANY, *et al.*,

Petitioners,

—against—

MOSHE WEINREICH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL APPENDIX OF PETITIONERS' STATEMENTS PURSUANT TO SUPREME COURT RULE 28.1

CHARLES PLATTO
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioners

Of Counsel:

WILLIAM E. HEGARTY
SUSAN BUCKLEY
KEVIN J. BURKE
CAHILL GORDON & REINDEL

RALPH L. HALPERN
RAICHLE, BANNING, WEISS & HALPERN

INDEX TO PETITIONERS' RULE 28.1 STATEMENTS

	Page
Aetna Casualty & Surety Company...	1
Aetna Insurance Company.....	10
Aetna Life Insurance Company.....	13
Allstate Insurance Company.....	13
American Automobile Insurance Company.....	15
American Mutual Liability Insurance Company.....	I7
Amica Mutual Insurance Company....	17
Atlantic Mutual Liability Insurance Company.....	18
Banner Casualty Company.....	18
Boston Old Colony Insurance Company.....	19
Centennial Insurance Company.....	23
Century Indemnity Company.....	23
Colonial Penn Insurance Company...	24
Commercial Insurance Company of Newark, N. J.....	26
Commercial Union Insurance Company.....	26

	Page
Continental Casualty Company.....	27
The Continental Insurance Company.	28
Criterion Insurance Company.....	29
Eagle Insurance Company.....	30
Employers Mutual Casualty Company.	30
Federal Insurance Company.....	30
Fidelity and Casualty Company of New York.....	32
Fireman's Fund Insurance Company..	32
Firemen's Insurance Company of Newark, New Jersey.....	33
General Accident Insurance Company of America.....	34
Glens Falls Insurance Company.....	34
Globe Indemnity Company.....	35
Government Employee Insurance Company.....	36
Graphic Arts Mutual Insurance Company.....	36

	Page
Great American Insurance Company..	37
Hanover Insurance Company.....	41
Hartford Accident & Indemnity Company.....	41
Hartford Casualty Insurance Company.....	44
Home Indemnity Company.....	44
Home Insurance Company.....	45
Ideal Mutual Insurance Company....	46
Insurance Company of North America.....	46
Liberty Mutual Insurance Company..	48
The Lumbermen's Mutual Insurance Company.....	49
Maryland Casualty Company.....	74
Merchants Mutual Insurance Company.....	49
Michigan Mutual Insurance Company.	50
National Grange Mutual Insurance Company.....	50

Page

Nationwide Mutual Insurance Company..... 51

New Jersey Manufacturers Insurance Company..... 52

Newark Insurance Company..... 53

The North River Insurance Company. 53

Prudential Property & Casualty Insurance Company..... 54

Reliance Insurance Company..... 55

Royal Indemnity Company..... 57

Royal Insurance Company..... 57

Safeco Insurance Company of America..... 58

St. Paul Fire & Marine Insurance Company..... 59

Sentry Insurance Mutual Company... 59

State Farm Mutual Automobile Insurance Company..... 61

State-Wide Insurance Company..... 61

	Page
Transamerica Insurance Company....	62
Travelers Indemnity Company.....	63
Travelers Indemnity Company of Illinois.....	64
Travelers Insurance Company.....	65
Unigard Insurance Group.....	66
United States Fidelity & Guaranty Company.....	66
USAA Casualty Insurance Company...	67
Utica Mutual Insurance Company....	67
Wausau Underwriters Insurance Company.....	68
Western Employers Insurance Company.....	69
Zurich Insurance Company.....	70

AETNA CASUALTY & SURETY COMPANY ("Aetna Casualty"):

Aetna Casualty advises the Court that its parent corporation is Aetna Life and Casualty Company. Aetna Casualty's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subsidiaries of Aetna Life and Casualty Company, and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are Coventry Land Corporation; Aetna Life and Casualty Limited; Aetna Nominees (N.Z.) Limited; Southern Cross Orchards; Urban Diversified Properties, Inc.; Aspen Skiing Company; Fortress Mountain Resorts, Ltd.; Pebble Beach Company;

Studio Properties Company; Am Co Ho Company; Aetna International (Chile) Limitada; Compania De Seguros Generales Aetna Banchile S.A.; Compania De Seguros De Vida Aetna Banchile S.A.; Administradora De Fundos De Pensiones Santa Maria S.A.; Hartford Center Hotel Partnership; Abcor Insurance Administration; Local Digital Distribution Company; Aetna Warburg Investment Management, Ltd.; Aetna Telecommunications Laboratories; Satellite Business Systems; Aetna Telecommunications Consultants; Geosource Inc.; Rahn Properties II; ABP Associates Limited; Portside Properties Limited; 1090 Vermont Avenue N.W. Associates Limited

Partnership; Mariner Brookhollow Joint Venture; Allis-Chalmers Leasing Partnership-1; Sioux-McCullough Peak, Ltd.; Camballin Farms; Taas Associates; Square 254 Limited Partnership; Aegen International, Inc.; Geosource EPIG Service Company, Ltd.; Geografrance S.A.; Geosource (South Africa) (Pty.) Limited; Geosource Argentina S.A.; Petroleum Drilling Services (Australia) Pty. Ltd.; Geosource Nigeria Limited; Geosource Saudi Arabia Co., Ltd.; GH Industrial Services Ltd.; Petroleum Drilling Services Columbia Pty. Ltd.; Romgeo Exploration Co. Ltd.; Petroleum Technology, Inc.; ARB Properties; Bayhill Three Associates; CS Develop-

ment Corporation; East Cactus Plaza Associates; Friday Associates; KCN A; Koll Center Newport Number 1; Koll Center Newport Number 2-3; Koll Center Newport Number 4; Koll Center Newport Number 6; Koll Center Newport Number 7; Koll Center Newport Number 8; Koll Center Newport Number 9; Koll Center Newport Number 10; Koll Center Newport Number 11; North Park Plaza Associates; Pantano Associates; Parkway Central Plaza Ltd.; KEP A; St. Vincents Mall; Village Plaza Associates; AOM Ltd.; AOM No. 2 Ltd.; Biltmore Fashion Park Associates; Broadbent Business Park Assoc. 1; Chris-Town Village Associates; Crossroads Shopping Center; Edina Office

Center Joint Venture; Empire Park Associates; Empire Park IV Associates; Golden State Associates; Hayward Industrial Park Associates II; Hillcrest Associates; Kemble Associates; Lincoln Benicia III Associates; Meridian Associates; Silverada Mall; Southwest Financial Plaza; TRI Freeways Associates; Tatum Associates; Washington Plaza; Westwood Mall Associates; Wit Associates; O'Hare Center Venture; Lincoln Oakland Coliseum I & II Associates; Yellow Brick Road; RBA II Associates; Southwest Financial Plaza Annex; Corporate Park Northwest Associates; Royal Commerce Center Associates; Crossroads Limited; Koll Business Centers-Bay Area; Koll

Business Centers-Orange; Koll Business Centers-San Diego; Koll Business Centers-San Diego #2; Koll Business Centers-Seattle; Koll Business Centers-Seattle #2; Northway Square Phase One; Rancho San Diego Village Associates; Valley Plaza Limited; Knoll Income Properties; Landex Properties Limited; Marex Properties Limited; 1001 Boulevard De Maisonneuve O. Inc.; Cottonwood Corner Shopping Center, Inc.; 160 Acre Tract Venture; B.K. Urban Venture; City Place Venture; Hodges Urban Venture; Marban; Marriot Urban Boston Venture; One Logan Square Associates; Mezzanine Restaurant Joint Venture; Montbello Commercial Venture; Montbello Community Venture; 900 North Michigan

Venture; Oakbrook Urban Venture; Old Orchard Urban Venture; Ritz-Carlton Water Tower Venture; 333 Wacker Drive Venture; Westglenn Venture; Hanover Properties; Streamwood Industrial Properties; Urban Miller-Davis Quincy Venture; Urban Miller-Davis Carlsbad Venture; Westban Hotel Venture; Merritt-Urban II Venture; 200 S. Wacker Venture; 841 Chestnut Partnership; Quincy Investment Company; Houston Center Athletic Club Venture; Carlsbad Research Center; Denver Tech Center Associates; DTC Shopping Center Associates; DTC Associates; Inland-Hussinger Joint Venture; Inland-Wilson Joint Venture; 95th and Jeffery Center; Lawrence Street

Associates; UIDC Miller-Davis City Center Venture; DTC Associates; Energy Center I; Energy Center II; Energy Center III; First of Denver Plaza; Urban Four-Seasons Hotel Venture; Denver Energy Center Hotel Venture; Blue Line Drive-In Theatres Pty. Ltd.; Consolidated Drive-In Theatres Corp. Pty. Ltd.; Drive-In Concessions Pty. Ltd.; East Coast Development Co. Pty. Ltd.; General Theatres Corp'n of A'sia Pty. Ltd.; Gepps Cross Investments Pty. Ltd.; Gilles Plains Drive-In Pty. Ltd.; Glenvue Expansion Pty. Ltd.; Greenfield Development Co. Pty. Ltd.; High-Line Drive-In Theatre Pty. Ltd.; Liverpool Estates Pty. Ltd.; Northern Forests Development Co. Pty.

Ltd.; Hollywood Drive-In Theatre Pty. Ltd.; Hoyts Distribution Pty. Limited; Hoyts Theatres (N.S.W.) Limited; Hoyts (Queensland) Pty. Limited; International News Pty. Ltd.; Western Suburbs Drive-In Pty. Ltd.; Main Line Drive-In Theatres Pty. Ltd.; Oakdale Drive-In Pty. Ltd.; O'Halloran Hill Drive-In Pty. Ltd ; Provincial Gardens Pty. Ltd.; Seaton Drive-In Pty. Ltd.; Parklands Estate Co. Pty. Ltd.; Starline Drive-In Theatres Pty. Ltd.; Valley Park Pty. Ltd.; Vernon Development Co. Pty. Ltd.; Village Drive-In (Toorak) Pty. Ltd.; Woodville North Drive-In Pty. Ltd.; Aetna Income Shares, Inc.; Aetna Variable Fund, Inc.; Compania Reaseguradora Bernardo O'Higgins S.A.

AETNA INSURANCE COMPANY
("Aetna Insurance"):

Aetna Insurance advises the Court that its parent corporation is Connecticut General Corporation. Connecticut General Corporation's parent is CIGNA Corporation. Aetna Insurance's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subsidiaries of Connecticut General Corporation and the wholly-owned subsidiaries of their wholly-owned subsidiaries and subsidiaries) are CG Fund, Inc.; CG Money Market Fund, Inc.; CG Income Fund, Inc.; Companion Fund, Inc.; Companion Income Fund, Inc.; CG Municipal Bond Fund, Inc.;

O'Hare West Plaza Venture; Paramus Park Associates; H&H Cerritos; Citrus Belle; Yacht Harbor Towers Venture; Paul, Berry, Congen; Sunpark III; North American General Corporation; The Howard Research and Development Corporation; Hotel Columbia Company; The 9033 Corporation; Ten Columbia Corporate Center Company; American Lloyds Insurance Company; Erieview Associates; Maui Surf Hotel Company; Secon Properties; Don Cesar Resort Hotel, Ltd.; Northcoast Investment Corporation; Atrium-Encino, Ltd.; R&B Executive Investments-Westchase Associates; Glendale Associates; Port Plaza Equities Limited Partnership; Pueblo Mall Limited Partnership;

Bloomington Hotel Investors; Alexandria Country Club Apartments; Fifth and Race Company; Marina Airport Building, Ltd.; Tulsa Limited Partnership; Oakwood Garden Apartments; Wallace-Lunt Joint Venture; and, Koll Tustin Business Center Ltd. In addition to the foregoing, the parent company of Connecticut General has varying ownership interests in numerous other companies, both foreign and domestic. Should the Court desire a listing of these companies, Aetna Insurance will supplement its submission.

AETNA LIFE INSURANCE COMPANY ("Aetna Life"):

Aetna Life advises the Court that its parent corporation is Aetna Life and Casualty Company. Aetna Life respectfully refers the Court to the statement submitted by The Aetna Casualty and Surety Company for the list of its affiliates and subsidiaries.

ALLSTATE INSURANCE COMPANY ("Allstate"):

Allstate advises the Court that its parent corporation is Sears, Roebuck and Co. Allstate's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subidiaries of Sears, Roebuck

and Co. and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are Allstate Insurance Company of Canada; Allstate Life Insurance Company of Canada; The Armstrong Rubber Company; Copolymer Rubber and Chemical Corporation; De Soto Inc.; Kellwood Company; Roper Corporation; Sears, Roebuck de Mexico, S.A. de C.V.; Sears, Roebuck de Venezuela, S.A.; Simpson-Sears Limited; Inglis Limited; Simpson-Sears Acceptance Co., Ltd.; Simpson-Sears Properties Ltd.; Kerrybrook Development Ltd.; Regional Shopping Centre Ltd.; and, Universal-Rundle Corp.

AMERICAN AUTOMOBILE INSURANCE COMPANY ("American Automobile"):

American Automobile advises the Court that its parent corporation is The American Insurance Company. The American Insurance Company is a subsidiary of Fireman's Fund Insurance Company, which is a subsidiary of Fireman's Fund Inc. Fireman's Fund Inc. is a wholly-owned subsidiary of American Express Company. American Automobile's affiliates and subsidiaries (except for the wholly-owned subsidiaries of The American Insurance Company and their wholly-owned subsidiaries, and the wholly-owned subsidiaries of Fireman's Fund Insurance Company, and the wholly-owned subsidiaries

of their subsidiaries and wholly-owned subsidiaries) are American Standard County Mutual Insurance Company; American Standard Lloyd's Insurance Company; San Francisco Insurance Company (U.K.) Ltd.; A.V.A. Partners; ATALFA, Inc.; Crusader Insurance Company Ltd.; AFIA Finance Corporation; Reinsurance Management Corporation of Asia (Pte.) Ltd.; RMCA Reinsurance (Pte.) Ltd.; San Francisco Reinsurance Company; and, The National Insurance Company of New Zealand, Limited. In addition to the foregoing, American Express Company holds varying interests in numerous companies, both foreign and domestic, outside the Fireman's Fund,

Inc. corporate structure. Should the Court desire a list of these companies, American Automobile will supplement its submission.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY ("American Mutual"):

American Mutual advises the Court that it has no parent company. American Mutual's affiliates and subsidiaries (except for wholly-owned subsidiaries) are American Mutual Insurance Company of Boston and American Policyholders Insurance Co.

AMICA MUTUAL INSURANCE COMPANY ("Amica"):

Amica advises the Court that it has no parent company, no subsidiaries

(except for wholly-owned subsidiaries) and no affiliates.

ATLANTIC MUTUAL LIABILITY INSURANCE COMPANY ("Atlantic Mutual"):

Atlantic Mutual advises the Court that it has no parent, subsidiaries or affiliates. Atlantic Mutual owns The Centennial Insurance Company. Together they form The Atlantic Companies.

BANNER CASUALTY COMPANY ("Banner"):

Banner advises the Court that in 1976 it was merged into the State-Wide Insurance Company. Banner respectfully refers the Court to the statement submitted by State-Wide Insurance Company.

BOSTON OLD COLONY INSURANCE COMPANY ("Boston Old Colony"):

Boston Old Colony advises the Court that its parent corporation is The Continental Corporation. Boston Old Colony's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subsidiaries of the Continental Corporation, and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are Marine Office of America Corporation; Associated Aviation, Inc.; Comercial Aseguradora Suizo Americana, S.A. (CASA); Puerto Rican-American Corporation; Pan American Finance Corporation; Promotora Continental, S.A.; Magdeburger

Ruckversicherungs, A.G.; Stenhouse Holdings Limited [Scotland]; Reed Stenhouse Companies Limited [Canada]; Continental Reed Stenhouse Management Company, Ltd.; First Fire & Marine Insurance Company, Ltd. [Korea]; Continental Life Insurance Public Limited Company [U.K.]; Continental Reed Stenhouse Management Company, Ltd.; Marine Office of America Corporation; The National Life Assurance Company of Canada; BHC Seguros Generales [Chile]; BHC Seguros De Vida [Chile]; C & W Title Insurance Company; Special Risk Syndicate Inc.; South Place Syndicate, Inc.; Insurnet, Incorporated; Buckhot, Inc.; Continental Risk Services, Ltd. [Bermuda]; Verzeker-

ing Maatschappij Minerva N.V. [Netherlands]; American Title Insurance Company; Columbia Real Estate Title Insurance Company; Land Title Company of Florida, Inc.; Hafez Insurance Co., Ltd. [Iran]; Comindus [France]; Commercial Afianzadora, S.A. [Guatemala]; Phoenix of Jamaica Assurance Co., Ltd. [Jamaica]; Phoenix Brasileira CIA de Seguros Gerais [Brazil]; La Intercontinental de Seguros S.A. [Dominican Republic]; United Asia Reinsurance Corporation, Ltd. [Singapore]; The Insurance Corporation of Ireland, Limited; Alte Leipziger Versicherung AG [Germany]; L'Union Nationale Societe Generale D'Assurances Du Proche Orient S.A.L., [Lebanon]; The

Maiden Lane Syndicate, Inc.; The Aljazirah Insurance Co. Limited [Bermuda]; The Continental Hellas Insurance Co. S.A. [Greece]; Phoenix Assurance Public Limited Company [U.K.]; Phoenix Continental, S.A. [Belgium]; Phoenix Assurance Company of New York; Asia Insurance Company [Hong Kong]; Sud Atlantica Compania De Seguros, S.A. [Argentina]; Pan-Malayan Insurance Corporation [Philippines] La Venezolana De Seguros C.A.; United Continental Insurance Sdn. Bhd. [Malaysia]; Malayan Overseas Ins. Corp. [Taiwan]; Phoenix Continental, S.A. [Belgium]; Phoenix Latino, S.A. [Spain]; Seguros Universales, S.A. [Guatemala]; Societe Nouvelle D'Assurances Du Cameroon (S.N.A.C.) [Cameroon].

CENTENNIAL INSURANCE COMPANY ("Centennial"):

Centennial advises the Court that it has no subsidiaries or affiliates. Centennial is owned by the Atlantic Mutual Liability Insurance Company. Together they form The Atlantic Companies.

CENTURY INDEMNITY COMPANY ("Century"):

Century advises the Court that it is a wholly-owned subsidiary of Aetna Insurance Company. Century has no subsidiaries. Century respectfully refers the Court to the statement submitted by Aetna Insurance Company for a listing of its affiliates.

COLONIAL PENN INSURANCE COMPANY ("Colonial"):

Colonial advises the Court that its parent corporation is Colonial Penn Group, Inc. Colonial has no subsidiaries other than wholly-owned subsidiaries. The affiliates of Colonial are Association Administrators, Inc.; Colonial Exchange, Inc.; Colonial Penn Communities, Inc.; CPC Agency, Inc.; Colonial Penn Group Data Corp.; Colonial Penn Life Insurance Company; Colonial Penn Services Corp.; Colonial Penn Travel Services, Inc.; Grand Circle Italia SPA; Grand Circle Tours (Western), Inc.; Grand Circle Travel, Inc.; Grand Circle Travel Limited; Grand Circle Travel (Western),

Inc.; G&C Advertising Services, Inc.; Holiday Advertising Services, Inc.; Colonial Penn Underwriters, Inc.; Group Association Plans, Inc.; Group Insurance Plans (North Carolina), Inc.; Hawthorne Advertising, Inc.; Hawthorne Computer Services, Inc.; Interamerica Life Insurance Company; Mature Temps, Inc.; MTI Payroll Services Corp.; National Association Plans, Inc.; New York National Association Plans, Inc.; Real Estate Data, Inc.; Real Estate Data, Inc. of California; Sanborn Map Company, Inc.; Special Accident & Health Plans, Inc.; and, Women Unlimited, Inc.

COMMERCIAL INSURANCE COMPANY OF NEWARK, N.J. ("Commercial Insurance"):

Commercial Insurance advises the Court that its parent corporation is Firemen's Insurance Company of Newark, New Jersey. Firemen's Insurance Company of Newark, New Jersey is a wholly-owned subsidiary of The Continental Corporation. Commercial Insurance respectfully refers the Court to the statement submitted by Boston Old Colony Insurance Company for the list of its affiliates and subsidiaries.

COMMERCIAL UNION INSURANCE COMPANY ("Commercial Union"):

Commercial Union advises the Court that its parent corporation is Commer-

cial Union Corporation. Commercial Union has no affiliates or subsidiaries other than its wholly-owned subsidiaries and wholly-owned subsidiaries of Commercial Union Corporation.

CONTINENTAL CASUALTY COMPANY ("Continental Casualty"):

Continental Casualty advises the Court that its parent corporation is CNA Financial Corporation. CNA Financial Corporation is a subsidiary of Loews Corporation. Continental Casualty's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subsidiaries of its subsidiaries and the wholly-owned subsidiaries of CNA Financial Corporation) are CNA Casualty of

Puerto Rico; American Casualty Company of Reading, Pennsylvania; National Fire Insurance Company of Hartford; and, Healthco, Inc. Loews Corporation also has interests in numerous companies both foreign and domestic. Should the Court desire a listing of those companies, Continental Casualty will supplement its submission.

THE CONTINENTAL INSURANCE COMPANY ("Continental Insurance"):

Continental Insurance advises the Court that its parent corporation is The Continental Corporation. Continental Insurance respectfully refers the Court to the statement submitted by Boston Old Colony Insurance Company

for the list of its affiliates and subsidiaries.

CRITERION INSURANCE COMPANY ("Criterion"):

Criterion advises the Court that its parent Company is Government Employees Insurance Company ("GEICO"). Criterion's affiliates and subsidiaries (except for its wholly-owned subsidiaries, GEICO's wholly-owned subsidiaries and the wholly-owned subsidiaries of subsidiaries and wholly-owned subsidiaries of GEICO) are AVEMCO Corporation and Government Employees Financial Corporation. Criterion respectfully refers the Court to the statement submitted by GEICO as well.

EAGLE INSURANCE COMPANY (sued as Lion Insurance Company) ("Eagle"):

Eagle advises the Court that it has no parent company, no subsidiaries and no affiliates. The Lion Insurance Company, formerly Eagle's subsidiary, was dissolved in 1976.

EMPLOYERS MUTUAL CASUALTY COMPANY ("Employers Mutual"):

Employers Mutual advises the Court that it has no parent company and no subsidiaries other than wholly-owned subsidiaries. Union Mutual Insurance Company of Providence is an affiliate of Employers Mutual.

FEDERAL INSURANCE COMPANY ("Federal Insurance"):

Federal Insurance advises the Court that its parent corporation is

The Chubb Corporation. Federal Insurance's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subsidiaries of The Chubb Corporation, and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are Argos Companhia de Seguros; Associated Aviation Inc.; Bolivar Compania de Seguros del Ecuador; Chubb do Brasil; Chubb Life Insurance Co. of America; Chubb Lloyd's Insurance Co. of Texas; Chubb Syndicate Inc.; DHC Corp.; Frank B. Hall (N.Y.I.E.), Inc.; Hartley Cooper (Holdings) Limited of London; Intremex, S.A.; J&H, WF Syndicate A; La Federation Europeenne Compagnie d'Assurance, S.A.; La

Federacion Compania de Seguros, C.A.; La Federacion Compania de Seguros, S.A.; Latin American Reinsurance Services Ltd.; Pacific Indemnity Company; Seguros "Illimani" S.A.; The Touchette Corp.; and, UPA, Inc.

FIDELITY AND CASUALTY COMPANY OF NEW YORK ("Fidelity"):

Fidelity advises the Court that its parent corporation is The Continental Corporation. Fidelity respectfully refers the Court to the statement submitted by Boston Old Colony Insurance Company for the list of its affiliates and subsidiaries.

FIREMAN'S FUND INSURANCE COMPANY ("Fireman's Fund"):

Fireman's Fund advises the Court that its parent corporation is Fireman's

Fund Inc. Fireman's Fund Inc. is a wholly-owned subsidiary of American Express Company. Fireman's Fund respectfully refers the Court to the statement submitted by American Automobile Insurance Company for the list of its subsidiaries and affiliates.

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY ("Firemen's Insurance"):

Firemen's Insurance advises the Court that its parent corporation is The Continental Corporation. Firemen's Insurance respectfully refers the Court to the statement submitted by Boston Old Colony Insurance Company for the list of its affiliates and subsidiaries.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA ("General Accident"):

General Accident advises the Court that it has no parent company, no affiliates and no subsidiaries other than wholly-owned subsidiaries. Pennsylvania General Insurance Company, Potomac Insurance Company of Illinois and General Accident form the General Accident Insurance Group. General Accident changed its name from General Accident Fire and Life Assurance Corporation Ltd. in January, 1982.

GLENS FALLS INSURANCE COMPANY ("Glens Falls"):

Glens Falls advises the Court that its parent corporation is Firemen's Insurance Company of Newark, New

Jersey. Firemen's Insurance Company of Newark, New Jersey is a wholly-owned subsidiary of The Continental Corporation. Glens Falls respectfully refers the Court to the statement submitted by Boston Old Colony Insurance Company for the list of its affiliates and subsidiaries.

GLOBE INDEMNITY COMPANY ("Globe"):

Globe advises the Court that its parent corporation is Royal Group, Inc. Globe has no affiliates or subsidiaries other than wholly-owned subsidiaries of Royal Group, Inc. Globe respectfully refers the Court to the statements submitted by Royal Insurance Company, Royal Indemnity Company and Newark Insurance Company as well.

GOVERNMENT EMPLOYEES INSURANCE COMPANY ("GEICO"):

GEICO advises the Court that its parent corporation is GEICO Corporation. GEICO's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subsidiaries of GEICO Corporation, and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are AVEMCO Corporation and Government Employees Financial Corporation.

GRAPHIC ARTS MUTUAL INSURANCE COMPANY ("Graphic Arts"):

Graphic Arts advises the Court that it has no parent company, affili-

ates or subsidiaries. Graphic Arts and Utica Mutual Insurance Company and its wholly-owned subsidiaries form the Utica National Insurance Group.

GREAT AMERICAN INSURANCE COMPANY ("Great American"):

Great American advises the Court that its parent corporation is Great American Holding Corporation. American Financial Corporation is the parent corporation of Great American Holding Corporation. Great American's affiliates and subsidiaries (except for wholly-owned subsidiaries) are Amer-Con, Inc.; American Financial Enterprises, Inc.; New Haven Corporation; American Money Management

Corporation; Carthay Center Productions Limited; DDP, Inc.; Dixie Terminal Corporation; Fairmont Foods Company; Abbotts Dairies, Inc.; AD Holding Corporation; Aloro Food Products, Ltd.; Country Club Dairy Company, Inc.; Fairmont Country Club Dairy, Inc.; Fairmont Creamery Company; Fairmont Dairy Company; Giant Snacks, Inc.; Monterre Properties, Inc.; Pizza Garden, Inc.; Tic Toc Systems, Inc.; U-Tote'm, Inc.; U-Tote'M Markets of Arizona, Inc.; U-Tote'M of Alabama, Inc.; U-Tote'M of Colorado, Inc.; U-Tote'M of Miami, Inc.; K.C.C. Holding Corporation; American Continental Insurance Company; First Southwest Life Insurance

Company; Nordstrom Group, Inc.; Nordstrom Agency, Inc.; Nordstrom Agency of Arizona, Inc.; Nordstrom Agency of Arkansas, Inc.; Nordstrom Agency of Florida, Inc.; Nordstrom Agency of Illinois, Inc.; Nordstrom Insurance Agency of Massachusetts, Inc.; Nordstrom Agency of Ohio, Inc.; Nordstrom Agency of Oklahoma, Inc.; Nordstrom Agency of Tennessee, Inc.; Nordstrom-Larpenteur Agency of Texas, Inc.; Nordstrom Risk Management, Inc.; Nordstrom Management Services, Ltd.; J-L-H International, Ltd.; North Star Management Services, Ltd.; Transportation Indemnity, Ltd.; Inter-Island, Ltd.; Nordstrom Risk Management of Illinois, Inc.; Nordstrom-Worth, Inc.;

Placement Facilities, Inc.; Nordstrom Agency of Dallas, Inc.; Nordstrom Agency of Houston, Inc.; Consolidated Underwriters, Inc.; Boca Grande Club, Inc.; Ocean Reef Club, Inc.; Moore Group Inc.; Casualty Underwriters, Inc.; Dudley L. Moore Insurance, Inc.; Hallmark General Insurance Agency, Inc.; Insurance Installment Service, Inc.; Middle Tennessee Underwriters, Inc.; Insurance Finance Company; Southeastern Fidelity Insurance Company; American Deposit Insurance Company; Granite Finance Co., Inc.; Georgia American Insurance Company; NGC Capital Management Corporation; NGC Realty Corporation; NGR Management Corp.; NGR Renting Corp.; One East

Fourth, Inc.; Pioneer Carpet Mills, Inc.; and, Three East Fourth, Inc.

THE HANOVER INSURANCE COMPANY ("Hanover"):

Hanover advises the Court that its parent company is State Mutual Life Assurance Company of America. Hanover's affiliates and subsidiaries (other than wholly-owned subsidiaries) are Citizens Insurance Company of America; California Compensation and Fire Company; Beacon Insurance Company of America; and, Worcester Mutual Insurance Company.

HARTFORD ACCIDENT & INDEMNITY COMPANY ("Hartford Accident"):

Hartford Accident advises the Court that its parent corporation is

Hartford Fire Insurance Company. Hartford Fire Insurance Company is a subsidiary of International Telephone and Telegraph Corporation. Hartford Accident's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subsidiaries of Hartford Fire Insurance Company, and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are Twin City Fire Ins. Co.; Hartford Lloyds Insurance Co.; Hartford Securities Co., Inc.; Wilton Sutter & Co.; Adapt, Inc.; Excess Underwriting Management Singapore (Pte.) Limited; Companhia Renascenca de Seguros Brazil; Transatlantiche

Ruckversicherungs-AG; Great Eastern Ins. Co.; London-Canada Ins. Co.; American Foreign Insurers Association; Industrial Risk Insurers; American Nuclear Insurers; Nuclear Risk Insurers; United States Aviation Insurers Underwriters; Thoroughbred International Insurance Co., Ltd.; and, Shippan International Insurance Co., Ltd. In addition to the foregoing companies, International Telephone and Telegraph Corporation has varying interests in many companies, both foreign and domestic, not within the Hartford Fire Insurance Company corporate structure. Should the Court desire a list of these companies, Hartford Accident will supplement its submission.

HARTFORD CASUALTY INSURANCE COMPANY ("Hartford Casualty"):

Hartford Casualty advises the Court that its parent corporation is Hartford Fire Insurance Company. Hartford Casualty respectfully refers the Court to the statement submitted by Hartford Accident & Indemnity Co. for the list of its subsidiaries and affiliates.

HOME INDEMNITY COMPANY ("Home Indemnity"):

Home Indemnity advises the Court that its parent corporation is The Home Insurance Company. The Home Group, Inc. is the parent of The Home Insurance Company. Home Indemnity has

no subsidiaries. Hawaiian Insurance & Guaranty Company Ltd. is an affiliate of Home Indemnity. Home Indemnity respectfully refers the Court to the statement submitted by The Home Insurance Company as well.

THE HOME INSURANCE COMPANY
("Home Insurance")

Home Insurance advises the Court that its parent corporation is The Home Group, Inc. Hawaiian Insurance & Guaranty Company Ltd. is the only subsidiary of Home Insurance that is not a wholly-owned subsidiary. All of the subsidiaries of The Home Group, Inc. are wholly-owned subsidiaries. The Home Group, Inc. is a wholly-owned

subsidiary of The City Investing Company.

IDEAL MUTUAL INSURANCE COMPANY ("Ideal"):

Ideal advises the Court that it has no parent company. Ideal's subsidiaries and affiliates are Optimum Coverage Managers, Inc.; Ideal Insurance Company (Bermuda) Ltd.; Optimum Holding Corporation; Optimum Insurance Company of Illinois; and, The Optimum Counseling Group Inc.

INSURANCE COMPANY OF NORTH AMERICA ("INA"):

INA advises the Court that it is a wholly-owned subsidiary of INA

Financial Corporation which is a wholly-owned subsidiary of INA Corporation. As of March 31, 1982, INA Corporation became a wholly-owned subsidiary of CIGNA Corporation which is also the parent company of Connecticut General Corporation and its subsidiaries. INA's affiliates and subsidiaries (except for wholly-owned subsidiaries) are Compagnie d'Assurances Colina S.A.; Compagnie Financiere INA; Compagnie Nouvelle d'Assurances; INA International Investors, Ltd.; La Nouvelle, S.A.; Paine Webber Incorporated and its seventy-four subsidiaries and affiliates; and Societe Civile Immobiliere Turina. In addition to the foregoing, the parent

companies of INA have varying ownership interests in over 350 other insurance, insurance-related, health care, real estate and investment companies, both domestic and foreign. Should the Court desire listings of these companies, and of the subsidiaries and affiliates of Paine Webber Incorporated, INA will supplement its submission.

LIBERTY MUTUAL INSURANCE COMPANY ("Liberty Mutual"):

Liberty Mutual advises the Court that it has no parent company. Liberty Mutual's subsidiaries and affiliates are Liberty Mutual Insurance Company (Massachusetts) Limited;

Liberty Mutual Management (Bermuda) Ltd.; Liberty Mutual Fire Insurance Company; Liberty Mutual (Bermuda) Ltd.; Liberty Life Assurance Company of Boston; Liberty International Agency, Inc.; Helmsman (Underwriting) Limited.

LUMBERMENS MUTUAL INSURANCE COMPANY ("Lumbermens Mutual"):

Lumbermens Mutual advises the Court that it has no parent company and no subsidiaries. The Ohio Hardware Mutual Insurance Company is an affiliate of Lumbermens Mutual.

MERCHANTS MUTUAL INSURANCE COMPANY ("Merchants Mutual"):

Merchants Mutual advises the Court that its parent company is Merchants

Insurance Group. Merchants Mutual has no subsidiaries or affiliates other than wholly-owned subsidiaries of Merchants Insurance Group.

MICHIGAN MUTUAL INSURANCE COMPANY (Sued in the Name of Michigan Mutual Liability Company) ("Michigan Mutual"):

Michigan Mutual advises the Court that it has no parent or affiliates, and no subsidiaries other than wholly-owned subsidiaries. Michigan Mutual Liability Company changed its name to Michigan Mutual Insurance Company in 1975.

NATIONAL GRANGE MUTUAL INSURANCE COMPANY ("National Grange"):

National Grange advises the Court that it has no parent company. National

Grange has no affiliates or subsidiaries other than its wholly-owned subsidiaries or their wholly-owned subsidiaries.

NATIONWIDE MUTUAL INSURANCE COMPANY ("Nationwide"):

Nationwide advises the Court that it has no parent company. Nationwide's affiliates and subsidiaries (except for its wholly-owned subsidiaries and their wholly-owned subsidiaries) are All Nations; Cedar Springs and Wesco Securities, Inc.; Gates McDonald and Company; Gates McDonald and Company of New York; Gulf Atlantic Life; Heritage Financial Services; Michigan Life; International Cooperative Bank Ltd.;

Heritage Securities; Multi Flex Advisors; National Casualty of America, Ltd.; National Casualty; Nationwide Real Estate Services; Nationwide Property Management; Nationwide Premium Accounts; Nationwide Mutual Fire Insurance Company; Nationwide Life; Nationwide Funding, Inc.; Nationwide Credit Services; Nationwide Corporation; Nationwide Consumer Services; Nationwide Consumer Disc.; Nationwide Consumer Credit; Nationwide Annuity Advisors; National Services; West Coast Life; and, Western Credit.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY ("New Jersey Manufacturers"):

New Jersey Manufacturers advises the Court that it has no parent

company, no affiliates and no subsidiaries other than wholly-owned subsidiaries.

NEWARK INSURANCE COMPANY ("Newark Insurance"):

Newark Insurance advises the Court that its parent company is Royal Group, Inc. Newark Insurance has no affiliates or subsidiaries other than wholly-owned subsidiaries of Royal Group, Inc. Newark Insurance respectfully refers the Court to the statements submitted by Globe Indemnity Company, Royal Insurance Company and Royal Indemnity Company as well.

THE NORTH RIVER INSURANCE COMPANY ("North River"):

North River advises the Court that its parent corporation is Crum

and Forster Corporation. North River's affiliates and subsidiaries (other than its wholly-owned subsidiaries and wholly-owned subsidiaries of Crum and Foster Corporation and their wholly-owned subsidiaries) are Blades, Driver & Co. Ltd.; Commonwealth County Mutual Insurance Company; and, Commonwealth Lloyd's Insurance Company.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY ("Prudential"):

Prudential advises the Court that its parent company is The Prudential Insurance Company of America. Prudential's affiliates and subsidiaries (other than wholly-owned subsidi-

aries) are PRUCO, Inc.; Pruco Life Insurance Company; 745 Property Investments; Sony Prudential Life Insurance Company Ltd.; Prudential Reinsurance Company; PIC Realty; PruCapital, Inc.; Bache Group, Inc.; Pruco Life Insurance Company of Texas; Gibraltar Casualty; Le Rocher, Compagnie de Reassurance, S.A.; Pruco Syndicate, Inc.; John Street Syndicate, Inc.; and, Essex Syndicate, Inc.

RELIANCE INSURANCE COMPANY ("Reliance"):

Reliance advises the Court that its parent corporation is Reliance Financial Services Corporation. Reliance Financial Services Corporation

is a wholly-owned subsidiary of Reliance Group, Inc. Reliance Group, Inc. is a subsidiary of Leasco Corporation. Reliance's affiliates and subsidiaries (other than its wholly-owned subsidiaries and the wholly-owned subsidiaries of Reliance Financial Services Corporation, Reliance Group, Inc. and Leasco Corporation and their wholly-owned subsidiaries) are Reliance Standard Life Insurance Company; United Pacific Insurance Company; Commonwealth Land Title Company; Title Insurance Company; Commonwealth Land Title Company of Montgomery; Moody-Tottrup International (Holdings) Ltd.; Moody-Tottrup International, Inc.; and, Reliance Lloyds.

ROYAL INDEMNITY COMPANY
("Royal Indemnity"):

Royal Indemnity advises the Court that its parent company is Royal Group, Inc. Royal Indemnity has no affiliates or subsidiaries other than wholly-owned subsidiaries of Royal Group, Inc. Royal Indemnity respectfully refers the Court to the statements submitted by Globe Indemnity Company, Newark Insurance Company and Royal Insurance Company as well.

ROYAL INSURANCE COMPANY OF AMERICA
(sued as Royal-Globe Insurance Company)
("Royal"):

Royal Insurance advises the Court that its parent Company is Royal

Group, Inc. Royal Insurance has no affiliates or subsidiaries other than wholly-owned subsidiaries of Royal Group, Inc. The Royal-Globe Insurance Company changed its name to Royal Insurance Company of America effective June 27, 1980. Royal Insurance respectfully refers the Court to the statements submitted by Globe Indemnity Company, Newark Insurance Company and Royal Indemnity Company as well.

SAFECO INSURANCE COMPANY OF AMERICA ("Safeco"):

Safeco advises the Court that its parent company is Safeco Corporation. Safeco's affiliates and subsidiaries are Safeco National Insurance

Company; General Insurance Company of America; and, First National Insurance Company of America.

ST. PAUL FIRE AND MARINE INSURANCE CO. ("St. Paul"):

St. Paul advises the Court that its parent company is The St. Paul Companies, Inc. St Paul's affiliates and subsidiaries (other than its wholly-owned subsidiaries and wholly-owned subsidiaries of The St. Paul Companies, Inc. and their wholly-owned subsidiaries) are St. Paul Adviser's Inc. and Western Life Insurance Co.

SENTRY INSURANCE MUTUAL COMPANY ("Sentry"):

Sentry advises the Court that it has no parent company. Sentry's

affiliates and subsidiaries (other than wholly-owned subsidiaries) are Sentry Insurance; Societe Nationale D'Assurance; SNA Holdings (Bermuda) Ltd.; SNA Holdings SAL; SNA - RE Bermuda, Ltd.; Sentry Fund, Inc.; Sentry Group Foundation, Inc.; Sentry Foundation, Inc.; Sentry Cash Management Fund, Inc.; Saudi Insurance Company, Ltd.; Photon Services, Inc.; Middle East Reinsurance Office; Magna Systems, Inc.; Jordan Eagle Insurance Company; Iran Life Company; Hanseco Insurance Company; Dairyland County Mutual Insurance Company of Texas; Century Communications Corporation; Building Society SAL; Bank of the Near East; AMC (U.K.), Ltd.; AMC (Morocco)

La Maracaine Via; and, Actuarial Management and Marketing Company Vaduz.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("State Farm"):

State Farm advises the Court that it has no parent company. All of State Farm's subsidiaries are wholly-owned subsidiaries. State Farm County Mutual Insurance Company of Texas is an affiliate of State Farm.

STATE-WIDE INSURANCE COMPANY ("State-Wide"):

State-Wide advises the Court that it has no parent company, subsidiaries or affiliates.

TRANSAMERICA INSURANCE COMPANY ("Transamerica"):

Transamerica advises the Court that its parent company is Transamerica Insurance Corporation of California which is a wholly-owned subsidiary of Transamerica Corporation. Transamerica's affiliates and subsidiaries (other than its wholly-owned subsidiaries, the wholly-owned subsidiaries of Transamerica Insurance Corporation of California and of Transamerica Corporation, and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are Compass Computer Service, Inc.; Occidental International Enterprises, Inc.; Direct Marketing Inter-

national; Lireas Holdings (Proprietary) Limited (S.A.); Occidental International Enterprises, Inc.; and Secured Development Co. Inc.

TRAVELERS INDEMNITY COMPANY ("Travelers Indemnity"):

Travelers Indemnity advises the Court that its parent corporation is The Travelers Corporation. Travelers Indemnity's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subsidiaries of The Travelers Corporation, and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are The Travelers Reinsurance Company of Bermuda,

Limited; Travcan, Ltd.; Travelers Indemnity Co. of Canada; Travelers Life Insurance Company of Canada; Reliance Agencies, Ltd.; Caribbean-Atlantic Life Insurance Co., Limited; Adria-T.I.C. International Holdings, S.A.; La Metropole, S.A.; Terra Nova Insurance Company, Limited; Travelers Life Insurance Co. (Overseas) Ltd.; Travelers Asset Management International Corp.; The Travelers U.S. Property Bermuda, Ltd.; Travelers Corp. of Asia, Limited; The Travelers Reinsurance Co. of Bermuda, Limited; and ALT Management Corp.

TRAVELERS INDEMNITY COMPANY OF ILLINOIS ("Travelers Illinois"):

Travelers Illinois advises the Court that its parent corporation is

The Travelers Corporation. Travelers Illinois respectfully refers the Court to the statement submitted by The Travelers Indemnity Company for the list of its affiliates and subsidiaries.

TRAVELERS INSURANCE COMPANY ("Travelers Insurance"):

Travelers Insurance advises the Court that its parent corporation is The Travelers Corporation. Travelers Insurance respectfully refers the Court to the statement submitted by The Travelers Indemnity Company for the list of its affiliates and subsidiaries.

UNIGARD INSURANCE GROUP ("Unigard"):

Unigard advises the Court that it has no parent company, affiliates or subsidiaries. Unigard is comprised of Unigard Insurance Company, Unigard Mutual Insurance Company and Olympic Life Insurance Company.

UNITED STATES FIDELITY AND GUARANTY COMPANY ("U.S. Fidelity"):

U.S. Fidelity advises the Court that its parent company is USF&G Corporation. U.S. Fidelity's subsidiaries are Fidelity and Guaranty Insurance Underwriters, Inc. and Fidelity and Guaranty Insurance Company. U.S. Fidelity's affiliates are Fidelity and Guaranty Life Insurance Company and The Del Mar Company.

USAA CASUALTY INSURANCE COMPANY ("USAA"):

USAA advises the Court that its parent company is United Services Automobile Association. USAA has no subsidiaries. USAA has no affiliates other than a wholly-owned subsidiary of United Services Automobile Association.

UTICA MUTUAL INSURANCE COMPANY (Utica Mutual"):

Utica Mutual advises the Court that it has no parent company. Utica Mutual has no affiliates or subsidiaries other than wholly-owned subsidiaries. Utica Mutual, its wholly-owned subsidiaries and Graphic

Arts Mutual Insurance Company form the Utica National Insurance Group.

WAUSAU UNDERWRITERS INSURANCE CO. (sued as Volkswagen Insurance Co.) ("Wausau"):

Wausau advises the Court that its parent company is Wausau Service Corporation which is a wholly-owned subsidiary of Employers Insurance of Wausau. Wausau has no affiliates or subsidiaries (other than wholly-owned subsidiaries of Wausau Service Corporation and their wholly-owned subsidiaries) except for Wausau County Mutual Insurance Company.

**WESTERN EMPLOYERS INSURANCE CO.
(sued as Leatherby Insurance Co.)
("Western Employers"):**

Western Employers advises the Court that its parent company is Western Employers, Inc., which is a wholly-owned subsidiary of Continental Financial Services Company which, in turn, is a wholly-owned subsidiary of The Continental Group, Inc. Western Employer's affiliates and subsidiaries (other than its wholly-owned subsidiaries, the wholly-owned subsidiaries of Western Employers, Inc., Continental Financial Services Company and The Continental Group, Inc. and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are Lawyers Abstract Corpora-

tion; Lawyers Title Company of Idaho; Lawyers Title of Arizona; Long & Melone, Ltd.; Ontario Title Insurance Agency, Ltd.; St. Francis County Abstract Company, Inc.; Sentinel Escrow, Ltd.; and, Meurke, Hickman & Snow Life Insurance Agency, Inc.

ZURICH INSURANCE COMPANY ("Zurich"):

Zurich advises the Court that it has no parent company. Zurich's affiliates and subsidiaries are Zurich Holding Company of America, Inc.; American Guarantee and Liability Insurance Company; Zurich Life Insurance Company; Zurich American Life Insurance Company; Zurich

American Insurance Company of Illinois; Empire Fire and Marine Insurance Company; Empire Indemnity Insurance Company; Fidelity and Deposit Company of Maryland; Fidelity and Deposit Holding Corporation; Fidelity and Deposit Company; Zurich Reinsurance Company of New York; Zurich Insurance Company of Missouri; Universal Underwriters, Inc.; Universal Underwriters of Texas; Universal Underwriters Insurance Company; Universal Underwriters Lloyds; Universal Underwriters Life Insurance Company; Universal Management, Inc.; Vita Life Insurance Company Limited [Switzerland]; Turegum Insurance Company [Switzerland]; Alpina Insurance Company Limited

[Switzerland]; Zurich Kosmos Versicherungen AG [Austria]; (Abri) Compagnie d'Assurances [France]; Deutsche Allgemeine Versicherungs-Aktiengesellschaft [Federal Republic of Germany]; Zurich Kautions-Und Kreditversicherungs Aktiengesellschaft [Federal Republic of Germany]; Zurich Internaional Versicherungs-Vermittlungs-Aktiengesellschaft [Federal Republic of Germany]; Agrippina Versicherung Aktiengesellschaft [Federal Republic of Germany]; Agrippina Lebensversicherung Aktiengesellschaft [Federal Republic of Germany]; Agrippina Ruckversicherung Aktiengesellschaft [Federal Republic of Germany]; Agrippina-Zurich Rechtsschutzversicherung

AG [Federal Republic of Germany]; Patria Versicherung Aktiengesellschaft [Federal Republic of Germany]; Danubio Compagnia di Assicurazioni [Italy]; Companhia de Seguros Metropole S.A. [Portugal]; (Hispania) Compania General de Seguros [Spain]; The Bedford General Insurance Company Limited [U.K.]; Zurich Life Assurance Company Limited [U.K.]; La Grantie Generale Marocaine (G.G.M.) [Morocco]; Iguazu Compania de Seguros [Argentine Republic]; Zurich International Ltd. [Bermuda]; Zurich Life Insurance Company of Canada; C.G.A. Fire and Accident Insurance Company Limited [Australia]; Commonwealth General Assurance Corporation Limited [Australia]; Shield Insurance Limited

[Australia]; and, Malayan Zurich Insurance Company, Inc. [Philippines].

MARYLAND CASUALTY COMPANY ("Maryland Casualty"):

Maryland Casualty advises the Court that its parent company is American General Corporation. Maryland Casualty's subsidiaries and affiliates are Assurance Company of America; American General Fire and Casualty Company; National Standard Insurance Company; Northern Insurance Company of New York; Steadfast Insurance Company; Valiant Insurance Company; American General Lloyds; Marcasco Co., Inc.; Robert Hampson & Son, Ltd.; Maine Bonding and Casualty

Company; American General Life Insurance Company; The Variable Annuity Life Insurance Company; American General Life Insurance Company of Delaware; American General Life Insurance Company of New York; Pioneer Security Life Insurance Company; American General Assurance Group (U.K.) Ltd.; American General Life Insurance Company of Oklahoma; California-Western States Life Insurance Company; National Public Service Insurance Company; Financial Life Assurance Company of Canada; Hawaiian Life Insurance Co., Ltd.; and Life and Casualty Insurance Company of Tennessee.

FILED
AUG 16 1982
ALEXANDER L
C

IN THE

Supreme Court of the United States

October Term, 1981

No. 81-2348

AETNA LIFE AND CASUALTY COMPANY,

Petitioner,

against

MORRIS C. GURNEE,

Respondent.

STATE WIDE INSURANCE COMPANY, *et al.*,

Petitioners,

against

MOSHE WEINREICH, and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel
WILLARD M. POTTLE, JR.
DOBOZIN & POTTLE
Attorneys for Respondent Gurnee
17 Court Street
Buffalo, New York 14202
(716) 852-6905

SHELDON V. BURMAN, P.C.
275 Madison Avenue
New York, New York 10016
(212) 685-7188
and
FUCHSBERG & FUCHSBERG
250 Broadway
New York, New York 10007
(212) 962-2800

LAWRENCE MILBERG
SOL SCHREIBER
A. DAVID STERN
Attorneys for Respondents
Milberg Weiss Bershad & Specthrie
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

Questions Presented

1. (a) Whether any substantial federal question is raised under the due process clause, where the New York State Court of Appeals first interprets a state statute dictating the terms of New York No-Fault automobile insurance contracts, thereby overruling a state regulatory agency's invalid interpretation of that statute upon which Petitioners claim to have relied, and where the Court of Appeals then applies its interpretive decision to contracts written after the effective date of the statute but before the decision.

   (b) Assuming *arguendo* that the foregoing acts of the New York Court of Appeals may result in a denial of due process in some circumstances, whether any substantial federal question warranting review by this court is presented by this record which is devoid of evidence that Petitioners have been injured by reason of that due process violation.

2. Whether any substantial federal question under the contract clause is raised where New York's highest court interprets the terms of a contract contrary to the understanding of one party who acted in reliance on his mistaken reading of the contract.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Counterstatement of The Case	2
Reasons Why The Writ Should Be Denied	7
Summary of Argument	7
1. (a) There Is Neither A Due Process Violation, Nor A Taking Of Property For Public Use Without Just Compensation, When Parties To A Contract Are Obliged to Fulfill Their Commitments	9
(b) No Substantial Federal Due Process Claim Is Stated Because the Record Does Not Establish that Petitioners Were Injured By Reason Of Any Of The Events They Complain Of	12
2. The Impairment Of Contracts Clause Is Not Violated By State Judicial Decisions	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES:

A. M. Klemm & Sons v. *City of Winter Haven*, 309 U.S. 638, 60 S. Ct. 810, 84 L.Ed. 993 (1940)	18
Atlantic Coast Line R.R. v. *Florida*, 295 U.S. 301, 55 S. Ct. 713, 79 L.Ed. 1451 (1935)	11
Board of Regents v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972)	13
Bouie v. *City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964)	12
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L.Ed. 1113 (1930)	8,9, 11,12
Chevron Oil Co. v. *Huson*, 404 U.S. 97, 90 S. Ct. 349, 30 L.Ed.2d 296 (1971)	6

Page

CASES (Continued):

City of Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L.Ed.2d 657 (1978) 10

Cross Lake Shooting & Fishing Club v. *Louisiana*, 224 U.S. 632, 32 S. Ct. 577, 56 L.Ed. 924 (1912) 16

Douglas v. *Pike County*, 101 U.S. 677, 25 L.Ed. 968 (1879) 17

Erie R.R. v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938) 17

Gelpke v. *City of Dubuque*, 68 U.S. (1 Wall) 175, 17 L.Ed. 520 (1863) 17

Government Insurance Co. v. *Sparrow*, 66 App. Div.2d 782, 410 N.Y.S.2d 657 (2d Dep't 1978) 4

Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L.Ed. 360 (1932) 9

Hibbard, Spencer, Bartlett & Co. v. *City of Chicago*, 308 U.S. 505, 60 S. Ct. 114, 84 L.Ed. 433, (1939) 18

Jeffries v. *Turkey Run Consolidated School District*, 492 F.2d 1 (7th Cir. 1974) 13

Kurcsics v. *Merchants Mutual Insurance Co.*, 93 Misc.2d 281, 402 N.Y.S.2d 763 (Sup. Ct. Erie Co. 1978) 4

Kurcsics v. *Merchants Mutual Insurance Co.*, 49 N.Y.2d 451, 426 N.Y.S.2d 454, 403 N.E.2d 159 (1980) 5,6 7,8,13,14,16

Linda R.S. v. *Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L.Ed.2d 536 (1973) 13

Mariniello v. *Shell Oil Co.*, 511 F.2d 853 (3rd Cir. 1975) 16

Matter of Rizzo, New York Law Journal, July 6, 1978 (Sup. Ct. Suffolk Co.) 5

Montgomery v. *Daniels*, 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444 (1975) 2,5

Page

CASES (Continued):

Patterson v. *Colorado*, 205 U.S. 454, 27 S. Ct. 556, 51 L.Ed. 879 (1907) 10

Raley v. *Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L.E.2d 1344 (1959) 12

Secor v. *Fulton*, 293 U.S. 517, 55 S. Ct. 574, 79 L.Ed. 1533 (1934) 18

State Farm Mutual Automobile Insurance Companies v. *Brooks*, 78 App. Div.2d 456, 435 N.Y.S.2d 419 (4th Dep't 1981) 2

Stockholders of Peoples Banking Co. v. *Sterling*, 300 U.S. 175, 57 S. Ct. 386, 81 L.Ed. 59 (1937) 16

Tidal Oil Co. v. *Flanagan*, 263 U.S. 444, 44 S. Ct. 197, 68 L.Ed. 382 (1924) 9,18

United States v. *Bensinger*, 507 F.2d 103 (7th Cir. 1974) 10

United States v. *Dillon*, 346 F.2d 633 (9th Cir. 1965) 8,9

Woodall v. *Keller*, 357 F. Supp. 595 (D. Md. 1972) 10

Worth v. *Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975) 13

Page

CONSTITUTIONAL PROVISIONS:

United States Constitution

Article 1, Section 10 ..... 6,7, 8,16,17

Amendment V 6,7, 8,9,12,13

Amendment XIV 6,7, 8,9,10,11,12,13

STATUTES:

Judicial Code

28 U.S.C. § 1652 17

New York Insurance Law [Comprehensive Automobile Insurance Reparations Act], Article 13, vol. 27 McKinney's Consolidated Laws of New York (1966 ed., 1981-1982 pocket part) 2

§ 176(1) 14

§ 183(1)(d) 13

§ 671 6

§ 671(1)(b) 3,4

§ 671(2)(a) 3,4

§ 671(4) 2

§ 672(1) 6

§ 672(3) 2

§ 676 2

§ 677(1) 2,15

§ 677(3) 2,15

§ 677(5) 3,13, 14,15

REGULATIONS:

New York Insurance Regulation

11 NYCRR 65.6(n)(2)(xi) 4

11 NYCRR 65.15(n)(2)(xi) 4

OTHER AUTHORITIES:

McKinney's Sessions Laws of New York, vol. 2 (1973), p. 2335 2

IN THE

Supreme Court of the United States

October Term, 1981

AETNA LIFE AND CASUALTY COMPANY,

Petitioner,

against

MORRIS C. GURNEE,

Respondent.

STATE WIDE INSURANCE COMPANY, *et al.*,

Petitioners,

against

MOSHE WEINREICH, and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Morris C. Gurnee and Moshe Weinreich on behalf of themselves and all others similarly situated respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Court of Appeals of the State of New York in this case.

Counterstatement of The Case

On February 13, 1973, the New York State Legislature enacted the Comprehensive Automobile Insurance Reparations Act, Article 13 of the Insurance Law [L. 1973, c. 13; 27 McKinney's Consolidated Laws, §§ 670-678] commonly known as the No-Fault law, which became effective on February 1, 1974. The Act, while curtailing to a certain extent the common law right of injured motorists and other covered persons to recover damages for pain and suffering except in the case of "serious" injuries [*see* Insurance Law § 671(4)], was designed primarily to "assure prompt and full compensation to accident victims of substantially all their economic loss without regard to fault" [2 McKinney's Session Laws of New York, 1973, p. 2335; *State Farm Mutual Automobile Insurance Companies* v. *Brooks*, 78 App. Div. 2d 456, 435 N.Y.S.2d 419 (4th Dep't 1981)], in exchange for limiting their common law rights. Another purpose of the law was reduction of the cost of automobile insurance premiums. *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 62, 378 N.Y.S.2d 1, 19, 340 N.E. 2d 444 (1975).

In effectuating the legislative purpose to reduce insurance premiums Insurance Law Section 676 mandates that each insurer's initial insurance premiums under No-Fault be at least 15% less, or if a $200 deductible is included,* 20% less than that insurer's premiums for such coverage was on January 1, 1973. Insurance Law Section 677(1) provides that no rate can be made effective until it has been approved by the Superintendent of the Department of Insurance. Section 677(3) provides that between February 1, 1974, the effective date of the statue, and subsequent dates (which have ultimately been extended to December 31, 1983), the approval of the Superintendent is required

* The Act mandated the provision of a $200.00 deductible option [Insurance Law Section 672(3)].

for all premium rate changes resulting in an increase in such rates above the previously approved level.* Section 677(5) provides for the establishment of procedures for the reimbursement to policy holders of "excess" profits of insurers attributable to No-Fault policies.

The No-Fault law commands that automobile accident insurance policies issued in New York State provide that covered persons (operators, passengers and pedestrians, and motorcyclists up to December 1, 1977) who are injured in accidents involving the operation of insured motor vehicles, be paid 80% of gross lost earnings, with a maximum benefit of $1,000.00 per month, for periods of disability up to three years from the date of the accident causing the injury [Insurance Law, Sections 671(1)(b), 671(2)(a)]. Section 671(1)(b) defines lost earnings as:

> Loss of earnings from work which the injured person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to $1,000.00 per month for not more than three years from the date of the accident causing the injury.

Section 671(2) reads:

> "First party benefits" means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less; . . .
>
> (a) 20% of lost earnings pursuant to paragraph (b) of subdivision (1) of this section.

---

* An approved rate could be lowered and then returned to its previous level without the need for new approval, but could not go above its highest previously approved level without review by the Superintendent.

Both before and after the effective date of the No-Fault law, uncertainty existed among the insurance community, the public and the judiciary* as to the effect, if any, of Section 671(2)(a)'s 20% reduction on the $1,000.00 monthly maximum provided for in Section 671(1)(b). Industry spokesmen frankly acknowledged that the language of the No-Fault law was less than clear. One insurance industry representative stated at public hearings before the Insurance Department: "as our first speaker mentioned, there is some ambiguity in the statute" [Appellant's Appendix in the New York Court of Appeals, pp. A287-A288**]. On January 25, 1974, seven days before the No-Fault law took effect, the New York State Department of Insurance issued an interpretive regulation stating that the maximum lost earnings benefit would be $800.00 per month ["Regulations Interpreting The Comprehensive Automobile Insurance Act," 11 NYCRR 65.6(n)(2)(xi), continued in 11 NYCRR 65.15(n)(2)(xi) as to accidents occurring on December 1, 1977 and after, reproduced at Petitioners' Appendix of Constitutional, Statutory and Regulatory Provisions, p. 20s]. However, the language of the standard policy continued to reflect the statutory mandate.*** Thereafter arbitrations of no-fault claims sometimes followed the interpretive regulation and sometimes

*Compare *Kurcsics* v. *Merchants Mutual Insurance Co.*, 93 Misc.2d 281, 402, N.Y.S.2d 763 (S. Ct. Erie Co. dec. February 28, 1978) (No fault claimants entitled to $1,000.00 lost earnings benefits) *with Government Insurance Co.* v. *Sparrow*, 66 App. Div. 2d 782, 410 N.Y.S.2d 657 (2d Dep't 1978) ($800.00 is maximum under statute).

** All documents referred to herein which are part of the record below will be provided to the Court on request.

*** Petitioners have failed to include a copy of the standard No-Fault policy in the record here as well as in the state courts. They have included copies of a brochure and policy cover letter [Appendix to the Petition, pp. A50a and A51a (hereinafter "A___a")] which refer to an $800.00 maximum. The policies themselves, however, two samples of which appear at pp. AA32 to AA35 of the appendix of the *Amici* in the Court of Appeals, read: "Work loss shall consist of the sum of the follcwing losses and expenses, up to $1,000.00 per

applied a $1,000.00 maximum lost earnings recovery, the Insurance Department Regulations notwithstanding [*See* Appendix of Samuel Uretsky, *et al., Amici Curiae* in the New York Court of Appeals, pp. AA80-AA113]. Arbitral decisions upholding the $1,000.00 figure were affirmed by the courts. *See, e.g., Matter of Rizzo,* New York Law Journal, July 6, 1978 (Sup. Ct. Suffolk Co.) [reproduced at *id.,* p. AA23].

In *Montgomery* v. *Daniels, supra,* the case in which the New York Court of Appeals affirmed the constitutionality of the No-Fault law, the court observed in *obiter dictum* that

> [c]ompenstion for basic economic loss is payable as "first party benefits" after reducing the *gross amount of such loss* by deducting (a) 20% of "lost earnings" . . .

38 N.Y.2d at 46-47; 378 N.Y.S.2d at 5 (emphasis added). This *dictum* foreshadowed the holding in *Kurcsics* v. *Merchants Mutual Insurance Company,* 49 N.Y.2d 451, 426 N.Y.S.2d 454, 403 N.E.2d 159 (1980), where in similar language* the Court of Appeals, construing the statute for the first time, held that the Insurance Department's interpretation of the statute, limiting to $800.00 the maximum lost earnings benefits, was of no force and effect as being contrary to the meaning of the No-Fault statute. The

---

month for a period of three years from the date of the accident: . . ." Paralleling the Insurance Law provisions themselves, a subsequent paragraph refers to the 20% deduction from lost earnings but the contract is silent as to whether or not the deduction related to the $1000.00 maximum figure.

* The court wrote:

> [p]laintiff forwards as the reasonable and correct interpretation of these statutory provisions, that the 20% deduction was intended to be computed *against the gross amount of lost earnings* claimed. . . . We agree with this contention.

49 N.Y.2d at 456-457, 426 N.Y.S.2d at 446 (emphasis added).

court held that the proper maximum benefit for lost earnings was $1,000.00 per month. *Kurcsics'* interpretation of the meaning of Insurance Law Section 671 was the first construction by a court of last resort of the statutory language incorporated in all No-Fault insurance policies [see Insurance Law § 672(1)] previously issued in the State of New York.

After *Kurcsics,* Respondents brought the instant actions below. They argued that *Kurcsics'* interpretation of the Insurance Law, and hence of their insurance contracts, should be applied to them so as to entitle them to payments equalling $1,000.00 per month for lost wages, rather than the $800.00 previously paid. On February 18, 1982, the New York Court of Appeals unanimously held that *Kurcsics* should be given retroactive effect [A28a]. Analyzing the factors set forth in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106-107, 90 S. Ct. 349, 30 L.Ed.2d 296 (1971), to determine whether a ruling should be retroactive, the unanimous court held that *Kurcsics* had been foreshadowed and did not establish a new principle of law; that retroactive application of *Kurcsics* would further the purposes of the No-Fault legislation by insuring that persons injured in automobile accidents covered by No-Fault would receive *prompt and full* compensation of economic losses; and, that balancing the equities and the effect of retroactive application on Petitioners and Respondents, the equities favored retroactivity [A30a-A33a]. The Court of Appeals further held without dissent that retroactive application of *Kurcsics* did not infringe the contract clause of the United States Constitution [Article 1, Section 10], because judicial construction of a state statute cannot by its nature constitute a "law impairing the obligations of contract." It further held that retroactive application was not an unconstitutional taking of property without due process because it was merely a function of its interpretation in 1980 of a statute

enacted in 1974 and insurance policies written thereafter pursuant to statutory mandate [A33a].

The instant Petition seeks review of the New York Court of Appeals' determination on those constitutional issues.

REASONS WHY THE WRIT SHOULD BE DENIED

Summary of Argument

In making its determination as to retroactivity or non-retroactivity, the New York court applied equitable and not constitutional principles—a classic state court function. It did this in the context of a case involving the interpretation of a state statute in a state regulated industry, applying an equitable balancing of the financial consequences of its decision. There is no federal question here.

Petitioners' claim of deprivation of property without due process or for public use without just compensation relates to the retroactive payments for lost earnings which the decision below will compel them to make and for which they claim they were unable to charge adequate premiums [Petition, pp. 9-10]. The allegation of injury is bottomed on their claim that they will be deprived of the right to recoup any retroactive payments by factoring such payments into future premium rate increase requests [Petition, p. 13]. Petitioners' claim under the contract clause is simply that their contracts called for a maximum lost earnings payment of $800.00 and to now compel them to pay more would constitute an impairment of their contracts [Petition, p. 15]. Because none of those contentions has merit, no substantial federal question is raised and therefore the writ should be dismissed.

There was no due process violation below. The New York Court of Appeals in *Kurcsics* merely construed a New York statute whose meaning was presented to that court for the first time after several *nisi prius* and intermediate appellate courts had disagreed as to its meaning. Whether

the maximum payment for lost earnings was $800.00, or more, up to $1,000.00 per month, depended on the interpretation of the statute. In the instant cases the issue was whether equity required that Petitioners be held to their contracts as the Court of Appeals had interpreted them in *Kurcsics*, or relieved of their statutory and contractual obligation. The Court held, *inter alia*, that because its *Kurcsics* ruling had been foreshadowed, equity required that insurance claimants receive the full benefits which the legislature intended them to have. Thus, the decision below merely obliged Petitioners to comply with their agreements. As the New York Court of Appeals held, no due process violation was occasioned thereby. *See Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L.Ed.2d 1113 (1930); *U.S.* v. *Dillon*, 346 F.2d 633 (9th Cir. 1965).

Moreover, the writ should be denied because the record indicates that Petitioners have not suffered the injury they allege. They have not shown that a vested property right has been impaired. Thus, no violation of their constitutional rights is stated. Since further state administrative and judicial procedures must take place before Petitioners' right to apply for recoupment can be vindicated or denied, their resort to certiorari is premature. Petitioners' bare claim that future recoupment of moneys they have been ordered to pay is not possible is utterly unsupported by the record. In addition, the statutory-regulatory scheme designed to reduce No-Fault insurance premiums gave them no assurance of premium rate increases in any event. Thus, Petitioners have not shown, and cannot show on this record, that they were deprived of property in violation of due process or for public use without just compensation.

As to Petitioners' contract clause claim, they have failed to cite persuasive authority for the change in settled law they seek when they request this Court to hold a retroactive decision of a state court interpreting a state statute violative of the contract clause of the federal constitution.

1. (a) There Is Neither A Due Process Violation Nor A Taking Of Property For Public Use Without Just Compensation, When Parties To A Contract Are Obliged To Fulfill Their Commitments.

It is not a taking of property without just compensation or a deprivation in contravention of due process to hold the insurance companies to their contractual obligation to pay $1,000.00 in monthly No-Fault lost earnings benefits.

> A Fifth Amendment "taking" does not occur when the state simply requires an individual to fulfill a commitment he had made.

U.S. v. *Dillon*, 346 F.2d 633, 638 (9th Cir. 1965).*

Moreover, the law is equally clear that a judicial decision retroactively applied does not amount to an unconstitutional deprivation of property without due process of law. As this court has stated:

> The mere fact that a state court . . . has overruled principles or doctrines established by previous decision *on which a party relied* does not give rise to a claim under the Fourteenth Amendment.

Brinkerhoff-Faris Trust and Savings Co. v. *Hill*, 281 U.S. 673, 680, 50 S. Ct. 451, 454, 74 L.Ed. 1113 (1930) (emphasis added). *Accord, Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 361, 364, 53 S. Ct. 145, 147, 148, 77 L.Ed. 360 (1932); *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 450, 44 S. Ct. 197, 198, 68 L.Ed.

---

* *Dillon* involved the question whether an attorney's services, i.e., his property, was taken without just compensation when a court directed him to represent an indigent criminal defendant. In view of the clear duty of the state to provide counsel to such defendants, it was not questioned in *Dillon* that if there had been an improper "taking" it was for a "public use" [U.S. Const., Am. V]. In the case at bar, by contrast, the Fifth Amendment provision that private property shall not "be taken *for public use*, without just compensation" [emphasis added], certainly cannot have been violated by the Court of Appeals' definition of the contractual-financial obligations existing between Petitioners and Respondents. That decision involved neither a "taking" nor a "public use."

382 (1924); *Patterson* v. *Colorado*, 205 U.S. 454, 461, 27 S. Ct. 556, 557, 51 L.Ed. 879 (1907); *United States* v. *Bensinger*, 507 F.2d 103, 104 (7th Cir. 1974); *Woodall* v. *Keller*, 357 F. Supp. 595, 596-97 (D. Md. 1972). If a state high court may reverse its own prior decision on which reliance was based without infringing the due process clause, *a fortiori* reliance on an administrative regulation which is later invalidated by a state court, as occurred below, presents no greater constitutional claim.

The petitioning insurance companies thus had no vested right in their interpretation that $800.00 per month was the statutory maximum, even taking into account the Insurance Department regulation to that effect. The due process clause does not shield Petitioners from the risk that a state court of last resort would disagree with that reading of the No-Fault law, and that there might thus result an imbalance between premium rates and policy benefits. Any party to a contract who withholds a payment due under the terms of the contract based on his construction of the document, always faces the risk that a court of last resort might interpret the contract contrary to his expectations.*

The cases relied on by Petitioners in asserting the existence of a substantial due process violation are not compelling. While *City of Los Angeles Dep't of Water and Power* v. *Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L.Ed.2d 657 (1978), indicates that the impact of retroactive judicial rulings on insurance funds must be carefully considered [435 U.S. at 721; 98 S. Ct. at 1382], this court

* Furthermore, Petitioners chose to live with the ambiquity rather than seek a declaration of the statute's true meaning from the New York courts, and thereby kept for themselves the benefit of the use of the funds that they did not pay out for up to eight years. It is neither inequitable nor punitive, nor would it violate due process as they now claim [Petition, p. 13], to subject them to the statutory 2% per month interest on the money they withheld from No-Fault claimants, particularly in an era of high interest rates.

there indicated that in assessing the availability of retroactive relief the equities must be weighed on a case by case basis [435 U.S. at 718-719, 723; 98 S. Ct. at 1380, 1383]. The New York Court of Appeals so analyzed the case below, considering, *inter alia*, the differing economic impact of retroactivity on each party and concluding that in this case, the equities favored retroactivity [A32a-A33a]. Petitioners have not challenged the standards or analysis by which the New York Court of Appeals reached that determination.

In *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301, 55 S. Ct. 713, 79 L.Ed. 1451 (1935), this court refused to order the return of tariffs collected under *voidable* regulations whose validity was ultimately upheld. That case does not support Petitioners' proposition that they should not be required to disburse retroactively funds they improperly failed to pay out in reliance on the *void* regulations of the Insurance Department at bar. In addition, the *Atlantic Coast Line R.R.* determination not to order reimbursement was based on the limited, prospective powers of the Interstate Commerce Commission and not at all on constitutional principles [295 U.S. at 311; 55 S. Ct. at 717]. Moreover, the phrase quoted by Petitioners [Petition, p. 11] observing the plight of the carrier who was "not at liberty to take the law into its own hands and refuse submission to the order [of the agency] . . ." was applied in *Atlantic Coast Line R.R.* in its analysis of whether *in that case, equity* required retroactivity [295 U.S. at 310-311; 55 S. Ct. at 717]. As stated, the New York Court of Appeals has considered the equitable aspects of this case and found against Petitioners.

In *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill, supra*, this court held that Federal due process rights may occasionally be violated by state judicial actions [281 U.S. at 679-680; 50 S. Ct. at 454], but it referred to procedural due process. There, in a classic Catch-22 decision, the

Missouri Supreme Court had affirmed denial of equitable relief by reason of laches, and upheld a tax assessment against Brinkerhoff-Faris, because they had failed to pursue administrative remedies before the State Tax Commission which, under precedents in effect until that very case, had been held not to exist. This Court held that "the practical effect of the judgment of the Missouri Court is to deprive the plaintiff of property without affording it *at any time* an opportunity to be heard in its defense" [281 U.S. at 678-679; 50 S. Ct. at 453]. That type of denial of procedural due process does not exist here. Petitioners herein had their forum and fair hearing in the New York courts in *Kurcsics* and the instant case. *Brinkerhoff-Faris* expressly noted that every overruling of precedent by a state court does not a due process claim make [281 U.S. at 680; 50 S. Ct. at 454, quoted *supra*, p. 9], and Petitioners' due process rights were not violated herein.

Finally, *Raley* v. *Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L.Ed.2d 1344 (1959), and *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964) were criminal matters involving vastly different and constitutionally more sensitive retroactivity considerations than the case at bar. *See Bouie* v. *City of Columbia, supra*, 378 U.S. at 352; 378 S. Ct. at 1702.

(b) No Substantial Federal Due Process Claim Is Stated Because The Record Does Not Establish That Petitioners Were Injured By Reason Of Any Of The Events They Complain Of.

Petitioners allege that because they will be deprived of the right to obtain a premium rate increase to recoup the lost earnings benefits they have been ordered to pay pursuant to their New York No-Fault contracts, the decision below deprives them of property without just compensation and in violation of due process [Petition, pp. 9-10, 13]. It is axiomatic that unless some impairment of Petitioners'

vested property rights is established, no claim of unconstitutional taking or violation of due process is stated. *See, e.g., Board of Regents* v. *Roth,* 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *Jeffries* v. *Turkey Run Consolidated School District,* 492 F.2d 1, 3 (7th Cir. 1974). Petitioners have not demonstrated that they may not recoup and thus have not shown that the constitutional rights they invoke have been violated.*

The relevant statutes indicate that the Insurance Department has authority to take appropriate action to provide for recoupment of losses resulting from retroactive application of *Kurcsics* if equity so requires. Furthermore, notwithstanding Petitioners' claim, the record does not establish, nor even support, the contention that they have ever had an absolute right to a rate increase, of which they have been deprived.

Petitioners have based their argument that they would not be entitled to recoupment on Sections 183(1)(d) and 677(5) of the New York Insurance Law.** However, neither of these statutes contains language foreclosing an insurance company from seeking a rate adjustment to compensate for paying out in any year benefits resulting from retroactive application of a decision invalidating an Insurance Department regulation which the company was required to follow. Section 183(1)(d) merely lists various factors to be considered in formulating rates, including "the past and prospective loss experience," "a reasonable profit,"

*Otherwise stated, unless and until it is established that Petitioners have been deprived of a vested right to recoup, the instant case is not ripe for consideration by this court of the grounds raised in the Petition. *Cf. Worth* v. *Seldin,* 422 U.S. 490, 499 n. 10 and accompanying text, 95 S. Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617, 93 S. Ct. 1146, 35 L.Ed.2d 536 (1973).

**See *e.g.,* Affidavit of Robert James Young, Jr. in support of Petitioners' motion below to dismiss the complaint, reproduced in Appellant's Appendix in the New York Court of Appeals, pp. A102-A105 at ¶¶5 and 7.

and "past and prospective expenses. . . ." Section 677(5) requires the Superintendent to establish a plan for refunding to the purchasers of No-Fault insurance policies "their share of the insurer's excess profit, if any, on such policies." Section 677(5) states that such a plan must take into consideration "the fact that losses or profits below a reasonable average profit will not be recouped from such policyholders." However, that language does not address a situation where, as here, insurance company "losses" resulted not from the company's underestimates of claims or expenses, but rather from compliance with an Insurance Department regulation subsequently held invalid.

In their joint affidavit below, on behalf of the Insurance Department of New York State* which appeared as *amicus* in support of Petitioners' motion to dismiss the complaint, Stanley A. Dorf and Milton L. Freedman do not state that there is any statutory prohibition disallowing recoupment of benefits paid out as a result of a retroactive application of *Kurcsics*. Rather, they state only that "under long-established principles of insurance rate making, insurers may not recoup losses by assessing either their past, present or future policy holders." But this does not necessarily refer to applications for premium increases. Such a general principle may not apply in the situation here, where the expenditures were not losses but ordinary benefit payments previously withheld as the result of mandatory compliance with Insurance Department regulations ultimately determined to be invalid. This conclusion is supported by the legislature's express declaration of policy that "[r]ates shall not be . . . inadequate, unfairly discriminatory, . . . or detrimental to the solvency of insurers" [Insurance Law Section 176(1)]. Allowing a rate adjustment if equity requires would be fair and proper.

* Appellant's Appendix in the New York Court of Appeals, pp. A258-A277 at A273.

In light of the foregoing, the proper channel for presentation of the instant claim in a way which might raise constitutional issues, would be for Petitioners to petition the Superintendent of Insurance for an adjustment of rates to compensate for the impact of any payments ordered in this action, receive a denial of such petition, bring appropriate judicial proceedings in the New York courts to review and then, after final New York appellate action denying their claim, file for certiorari, if there is a constitutional basis.

Petitioners cannot claim that they have been injured by the decision below until such state procedures have been followed. Only when that has happened may they assert their challenge based on the alleged existence of the "long-established principles of insurance rate making," referred to above. Here they are improperly challenging a decision of New York's Court of Appeals interpreting a law of the state, before a showing that they have sustained constitutionally recognized injury.

Petitioners' claims that New York has deprived them of their alleged existing rights to rate increases by forcing them to conform their benefit structure to the void Insurance Department regulation and then retroactively altering the benefit structure to their detriment, are utterly unsupported. While Respondents were certainly financially prejudiced to the tune of up to $200.00 per month in heretofore withheld reimbursements for lost earnings, all the law ever assured Petitioners was an opportunity to *request* premium increases; not an absolute right to their award. *That* ultimate decision is in the Superintendent's discretion [Insurance Law Section 677(3)]. In view of the legislative purpose to reduce premiums, and its commands that initial No-Fault premiums be reduced by 15% to 20% below previous premiums [Insurance Law Section 677(1)] and that losses or less than reasonable average profits arising out of No-Fault may not be a basis for recoupment from

policyholders [Insurance Law Section 677(5)], it is improbable at best that the increased insurance company payouts which would have been attributable to a $1,000.00 rather than an $800.00 maximum lost-earnings recovery would have generated an exercise of discretion by the Superintendent to permit increased premiums. Thus, it is not established on this record that reliance on the void Insurance Department Regulation caused Petitioners any injury at all. Consequently, they present no compelling claim of violation of their constitutional rights worthy of this court's attention at this juncture.

2. The Impairment of Contracts Clause Is Not Violated By State Judicial Decisions.

Petitioners assert that their insurance contracts would be impaired if the decision of the New York Court of Appeals is permitted to stand and they are compelled to pay $1,000.00 in no-fault benefits to pre-*Kurcsics* accident victims, when they had calculated premiums based on the assumption that $800.00 would be the maximum amount payable. This claim, as the New York Court of Appeals unanimously held, has no merit.

Article I, Section 10 of the United States Constitution is expressly addressed to legislative action. It commands that "[n]o state shall . . . *pass any* . . . *law* impairing the obligation of contracts." (Emphasis added). Legislatures "pass" laws; courts do not. Thus, the authorities are legion that no federal question is raised by a determination of a state court under a *pre-existing* statute even if it erroneously impairs the obligations of a contract. *See, e.g., Cross Lake Shooting and Fishing Club* v. *Louisiana,* 224 U.S. 632, 638, 32 S. Ct. 577, 579, 56 L.Ed. 924 (1912); *Stockholders of Peoples Banking Co.* v. *Sterling,* 300 U.S. 175, 182, 57 S. Ct. 386, 390, 81 L.Ed. 59 (1937). The Third Circuit Court of Appeals most recently so held in *Mariniello* v. *Shell Oil Co.,* 511 F.2d 853, 859 (3rd Cir. 1975). Rejecting a contract-clause challenge, that court

upheld the retroactive application of a New Jersey Supreme Court ruling which held invalid on state public policy grounds termination-at-will clauses in gasoline station franchises and leases. If a judicial determination striking an unambiguous contract provision is not an impairment, *a fortiori* a judicial interpretation defining a disputed term is not an impairment. Indeed, acceptance of Petitioners' argument would preclude all judicial review of disputed contracts, since any determination in favor of one party would necessarily affect the contractual expectations of the other party.

Lacking direct authority for their claim, Petitioners' only argument is that these rules are now of doubtful validity [Petition, pp. 16-17]. They pass over into an entirely different and inapplicable frame of reference and cite by way of analogy cases interpreting the Rules of Decision Act [Judiciary Act of 1789, 28 U.S.C. § 1652] as including state judicial decisions among the sources of state law to which federal courts must give deference in appropriate situations (such as diversity cases). The Act provides, however, that "[t]he laws of the several states, *except where the constitution* or treaties of the United States or Acts of Congress *otherwise require or provide*, shall be regarded as rules of decision . . .". Petitioners invoke *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938) because it defined the Act's "laws" to include judicial decisions. With respect to the impairment of contract issue at bar, the constitution has "otherwise provided." The United States Constitution Article 1, Section 10 expressly requires states only to refrain from *passing* laws impairing the obligations of contracts. Acts of state courts are not within its purview. Therefore, *Erie* and The Rules of Decision Act have no application at bar.

Petitioners also cite *Gelpcke* v. *City of Dubuque*, 68 U.S. (1 Wall.) 175, 17 L.Ed. 520 (1863) and *Douglas* v. *Pike County*, 101 U.S. 677, 25 L.Ed. 968 (1879) in support

of their view that a judicial construction of a state statute may constitute an unconstitutional impairment of a contract [Petition, p. 17]. This court has expressly rejected the reliance which Petitioners place on those cases. In *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 451, 44 Sup. Ct. 197, 199, 68 L.Ed. 382 (1924), referring to the above two cases among others, this court noted that "the fact that it has been necessary for this court to decide the question [that judicial decisions do not violate the impairment clause] so many times is evidence of persistent error in regard to it." Thus, in repeated instances where the issue has been presented on appeal, this court has dismissed for want of a substantial federal question. *See, A.M. Klemm & Sons* v. *City of Winter Haven*, 309 U.S. 638, 60 S. Ct. 810, 84 L.Ed. 993 (1940); *Hibbard, Spencer, Bartlett & Co.* v. *City of Chicago*, 308 U.S. 505, 60 S. Ct. 114, 84 L.Ed. 433 (1939); *Secor* v. *Fulton*, 293 U.S. 517, 55 S. Ct. 574, 79 L.Ed. 1533 (1934). We respectfully urge the court to do the same with this Petition.

CONCLUSION

For all of the foregoing reasons, Respondents Morris C. Gurnee and Moshe Weinreich, *et al.*, pray that the writ of certiorari be denied.

Respectfully submitted,

Of Counsel
WILLARD M. POTTLE, JR.
DOBOZIN & POTTLE
Attorneys for Respondent Gurnee
17 Court Street
Buffalo, New York 14202
(716) 852-6705

SHELDON V. BURMAN, P.C.
275 Madison Avenue
New York, New York 10016
(212) 685-7188
and
FUCHSBERG & FUCHSBERG
250 Broadway
New York, New York 10007
(212) 962-2800

LAWRENCE MILBERG
SOL SCHREIBER
A. DAVID STERN
Attorneys for Respondents
Milberg Weiss Bershad & Specthrie
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

Office - Supreme Court, U.S.
FILED
AUG 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AETNA LIFE AND CASUALTY COMPANY,

Petitioner,

—against—

MORRIS C. GURNEE,

Respondent.

STATE-WIDE INSURANCE COMPANY, *et al.*,

Petitioners,

—against—

MOSHE WEINREICH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THE PETITION

CHARLES PLATTO
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioners Listed on the Inside Cover

Of Counsel:

WILLIAM E. HEGARTY
SUSAN BUCKLEY
KEVIN J. BURKE
CAHILL GORDON & REINDEL
(A Partnership Including Professional Corporations)

RALPH L. HALPERN
RAICHLE, BANNING, WEISS & HALPERN

August 16, 1982

Petitioners:

Aetna Casualty & Surety Company; Aetna Insurance Company; Aetna Life Insurance Company; Allstate Insurance Company; American Automobile Insurance Company; American Mutual Liability Insurance Company; Amica Mutual Insurance Company; Atlantic Mutual Liability Insurance Company; Banner Casualty Company; Boston Old Colony Insurance Company; Centennial Insurance Company; Century Indemnity Company; Colonial Penn Insurance Company; Commercial Insurance Company of Newark, N.J.; Commercial Union Insurance Company; Continental Casualty Company; The Continental Insurance Company; Criterion Insurance Company; Eagle Insurance Company (sued as Lion Insurance Company); Employers Mutual Casualty Company; Federal Insurance Company; Fidelity and Casualty Company of New York; Fireman's Fund Insurance Company; Firemen's Insurance Company of Newark, N.J.; General Accident Insurance Company of America (sued as General Accident Fire & Life Assurance Corporation, Ltd.); Glens Falls Insurance Company; Globe Indemnity Company; Government Employees Insurance Company; Graphic Arts Mutual Insurance Company; Great American Insurance Company; Hanover Insurance Company; Hartford Accident & Indemnity Company; Hartford Casualty Insurance Company; Home Indemnity Company; Home Insurance Company; Ideal Mutual Insurance Company; Insurance Company of North America; Liberty Mutual Insurance Company; The Lumbermen's Mutual Insurance Company; Maryland Casualty Company; Merchants Mutual Insurance Company; Michigan Mutual Insurance Company (sued as Michigan Mutual Liability Company); National Grange Mutual Insurance Company; Nationwide Mutual Insurance Company; New Jersey Manufacturers Insurance Company; Newark Insurance Company; The North River Insurance Company; Prudential Property & Casualty Insurance Company; Reliance Insurance Company; Royal Insurance Company (sued as Royal-Globe Insurance Company); Royal Indemnity Company; Safeco Insurance Company of America; St. Paul Fire & Marine Insurance Company; Sentry Insurance Mutual Company; State Farm Mutual Automobile Insurance Company; State-Wide Insurance Company; Transamerica Insurance Company; Travelers Indemnity Company; Travelers Indemnity Company of Illinois; Travelers Insurance Company; Unigard Insurance Group; United States Fidelity & Guaranty Company; USAA Casualty Insurance Company; Utica Mutual Insurance Company; Wausau Underwriters Insurance Company (sued as Volkswagen Insurance Company); Western Employers Insurance Company (sued as Leatherby Insurance Company); Zurich Insurance Company.

Respondents' answer to the petition for a writ of *certiorari* and to the decision below, which requires the insurance carriers of the State of New York to retroactively pay out benefits for which they were prohibited from collecting the underlying premiums, is that the carriers should apply to the Insurance Department for an increase in their future rates to compensate them for their losses.

The Insurance Department is already on record in this action in stating that any such future rate increases would not be appropriate. (A273) Furthermore, the ultimate inequity of charging future policy holders for benefits received by past claimants who never paid for those benefits is self-evident. Most importantly, it is no answer to the constitutional injustices visited upon the carriers by the decision below to suggest, albeit erroneously, that the carriers could and should shift their losses to the general public. Rights guaranteed by the Constitution may not be circumvented in this fashion. *Cf. Carey* v. *Piphus*, 435 U.S. 247, 266 (1978).

Respectfully submitted,

CHARLES PLATTO
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioners

Of Counsel:

WILLIAM E. HEGARTY
SUSAN BUCKLEY
KEVIN J. BURKE
CAHILL GORDON & REINDEL
(A Partnership Including
Professional Corporations)

RALPH L. HALPERN
RAICHLE, BANNING, WEISS & HALPERN

August 16, 1982